No. 2814

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

EASTERN OREGON LAND COMPANY,
a Corporation,
Appellant,

vs.

DESCHUTES RAILROAD COMPANY,
a Corporation,
Appellee.

DESCHUTES RAILROAD COMPANY,
a Corporation,
Appellant,

vs.

EASTERN OREGON LAND COMPANY,
a Corporation,
Appellee.

Appellant's Brief.

VEAZIE, McCOURT & VEAZIE,
CHARLES S. WHEELER and
JOHN F. BOWIE,
Solicitors for Appellant.

JOHN F. BOWIE,
Counsel.

Filed this.....day of October, 1916.

F. D. MONCKTON, Clerk.

By....., Deputy.

The James H. Barry Co.,
San Francisco

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Sherar Properties.

(a) *The Bridge Property.*

Defendant did not acquire a right-of-way over the Sherar Bridge property under the Act of March 3, 1875, for the following reasons:

1. This property was embraced in a lieu selection made two years before the map of location was filed, and patents have issued to the selector. The rights of the selector were prior to the rights acquired by the railroad company under the Act of March 3, 1875 (*Daniels* v. *Wagner*, 237 U. S., 547).

2. At the time the map of definite location was filed, these lands were not subject to the operation of the Act of March 3, 1875, as the lands had been theretofore withdrawn for the purpose of establishing irrigation works thereon under the Act of June 17, 1902.

3. Even if the railroad company had acquired a right-of-way through filing its map of definite location, it abandoned all rights acquired thereby on entering upon this tract of land and other land in the possession of the plaintiff under a license covering the tract as a whole. It cannot claim under the license in part and repudiate the license in part.

(b) *Sherar Properties Other Than the Bridge Properties.*

1. The right of the railroad upon the Sherar properties is dependent upon and measured by the license under which

the railroad entered. By the terms of this license, the railroad company undertook to construct the road in such manner that a dam sixty feet high might be maintained on the land by the owners of the land. Under such agreement, the obligation to see that the road was so located as to permit the maintenance of such dam rested on the railroad company (*Unangst's Appeal*, 55 Pa. St., 128), and the rights of the railroad company under the license are subject and subordinate to the right of the land company to erect and maintain the dam.

2. The unexecuted parol agreement between Laughlin and the railroad company was not binding on plaintiff, whatever its terms may have been. Plaintiff acquired the Laughlin interest before any steps were taken in execution of the alleged agreement, and it is admitted that the railroad company had knowledge of the transfer and did no act in execution of the Laughlin agreement; it is also admitted that plaintiff purchased without knowledge of the Laughlin agreement.

3. The plaintiff is not estopped from objecting to the line of the railroad as actually located. The obligation to locate the line correctly rested upon the railroad company—not upon plaintiff. The means and knowledge of the railroad company were equal to, if not greater than, the means and knowledge of plaintiff, and the railroad company did no act in reliance on any representation of plaintiff, nor did plaintiff make any representation to the railroad company or negligently induce it to alter its position to its prejudice.

(c) *Interior Development Company Properties.*

Whatever rights may exist in favor of the railroad over the properties of the Interior Development Company, these rights cannot be asserted by the railroad for the purpose of defeating the obligations which it assumed in relation to the Sherar lands.

(d) *Equitable Condemnation Should Not Be Decreed.*

A railroad company entering upon real property under an agreement to construct its road in such manner as not to interfere with the development of water-power must perform the condition under which it entered, and equitable condemnation will not be decreed unless public convenience so requires. Under such circumstances, the road will be compelled to conform to the terms of the contract (*Unangst's Appeal,* 55 Pa. St., 128).

(e) *Damages.*

If in this case equitable condemnation is to be decreed, plaintiff is entitled to compensation for the injury done to its property as a whole, as well as to compensation for property actually taken.

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STATEMENT OF FACTS.

HISTORY OF LAND TITLES.

From the year 1871 and until the time of his death, J. H. Sherar was in possession of certain land situated in the Cañon of the Deschutes River. The land is delineated in red on the following map:

Lands patented prior to 1906.

As early as 1882 the SE¼ of Section 34, Township 3 South, Range 14 East, of Willamette Meridian, was patented to Sherar by the United States, while prior to January 27, 1906, patents were issued to him conveying the fee to all the other parcels except those three parcels designated on the accompanying map by the letter "C," of which one is situated in Township 3, Section 35, and two in Township 4, Section 3. Sherar believed he had acquired title to these lands, but in this he was in error.

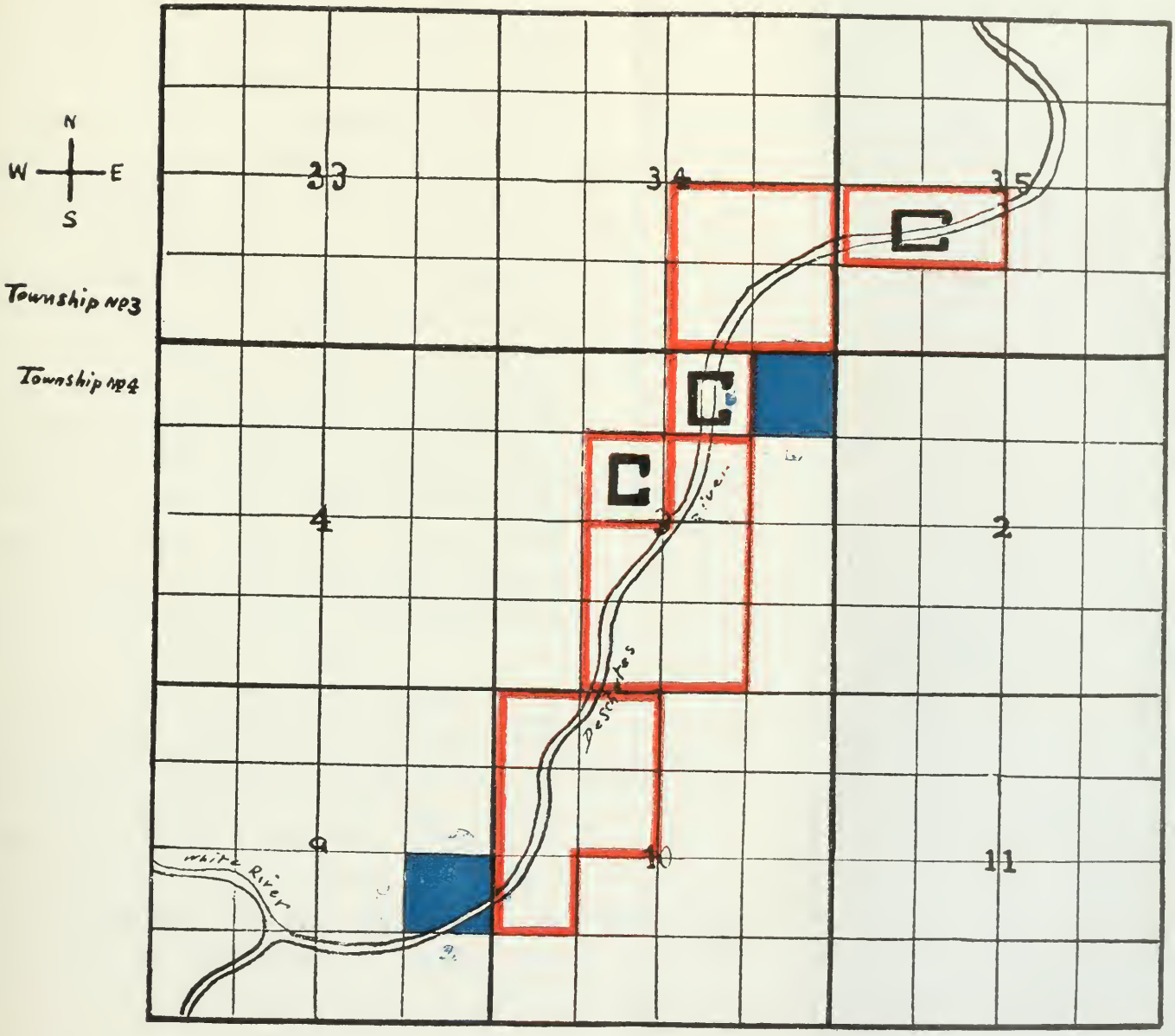
Lands for which patents did not issue till 1913.

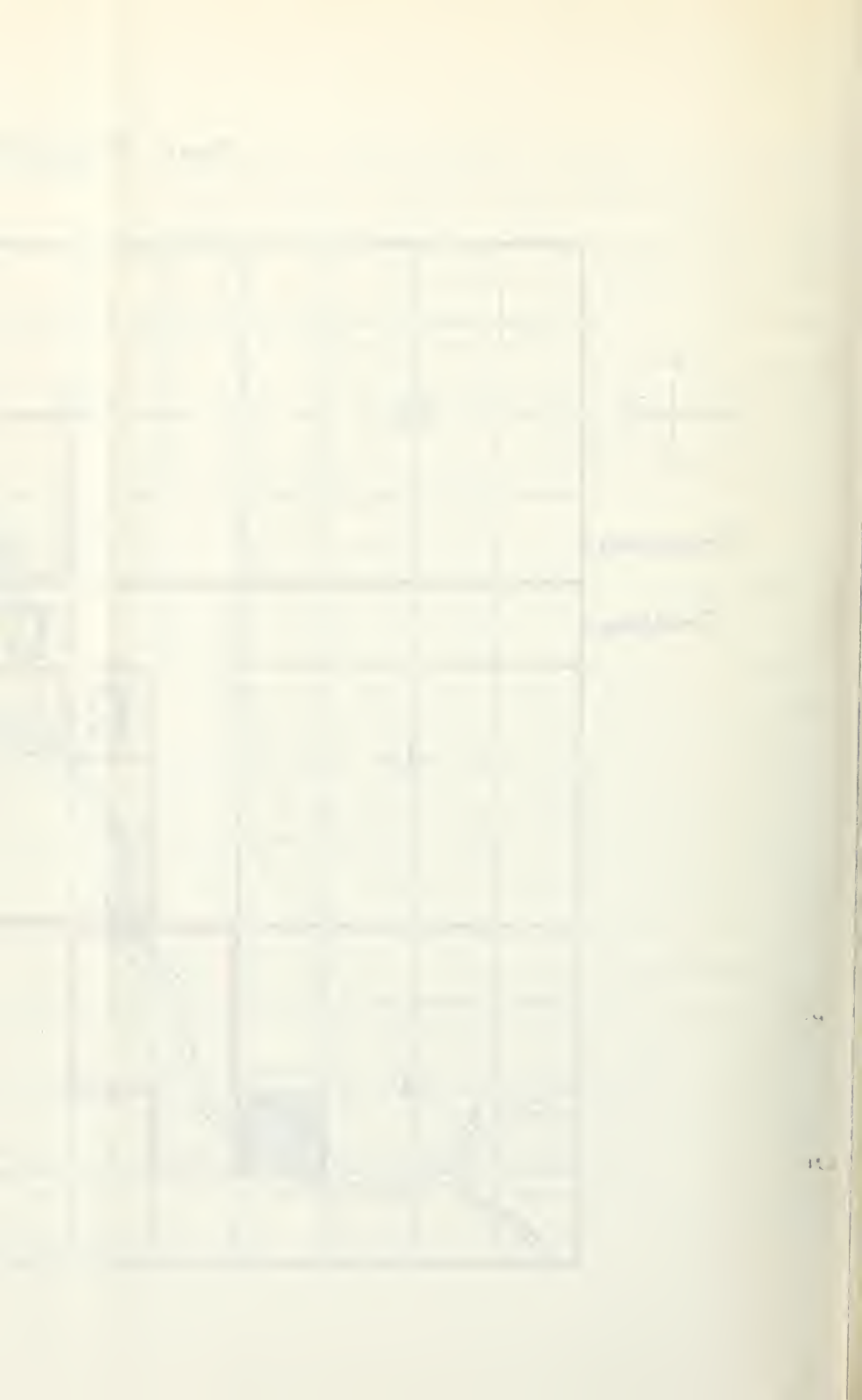
In January, 1906, the Interior Development Company, having theretofore negotiated to acquire title to all these parcels by purchase from Sherar, filed its selections covering these three properties. Promptly on discovering these facts, Sherar filed his selection and contested the selections of the Interior Development Company. This contest dragged its way through the Land Department and was finally decided in favor of Sherar on June 16, 1909. A copy of the opinion of Mr. Pierce, then First Assistant Secretary of the Department of the Interior, is contained in the Transcript (pp. 612-622). The opinion demonstrates quite clearly that all three parcels had been in the bona fide occupancy and possession of Sherar from 1871; that his occupancy thereof had been recognized in the community in which he lived, and that the land was not vacant public land of the United States.

Contest between Sherar and the Interior Development Company.

Sherar's application for patent to this land under

Range No 14 E. W.M.





lieu selection necessarily awaited the conclusion of the contest, which lasted until June, 1909. Withdrawal orders.

While this contest was pending, certain withdrawal orders were made: one dated April 26, 1906, withdrawing all tracts of land situate in Township 3, except any tracts title to which had passed out of the United States, and a similar order dated October 24, 1908, and embracing the lands in Township 4, the lands in each instance being temporarily withdrawn for irrigation works pursuant to the Act of June 17, 1902. On December 30, 1909, and March 18, 1910, these lands were embraced in another withdrawal order, and it was stated that the same were withdrawn in aid of proposed legislation affecting the disposal of power sites on the public domain. On July 2, 1910, the withdrawals of March and December were confirmed under the Act of June 25, 1910 (36 Stat., 847), but on February 25, 1913, the rights of Sherar were finally recognized, the withdrawal canceled, and patents issued to the assigns of Sherar. Cancellation of withdrawal orders and issuance of patent.

On January 27, 1906, Sherar gave an option on all of the property above mentioned to Hostetler. This option was assigned by Hostetler to Laughlin on April 14, 1909, and by Laughlin to the Eastern Oregon Land Company on August 5, 1909; and on December 4, 1909, the option was exercised by the Eastern Oregon Land Company. Full payment was made on March 30, 1910, and title transferred to that corporation. Option to Hostetler. Assignments of options. Deed to plaintiff.

THE POWER PROJECT.

Early appreciation of power possibilities.

As early as 1906 it was known that the principal value of the lands involved in this controversy arose from their availability for use as a power site. It seems, however, to have been considered by all persons interested in the project prior to 1910, that the erection of a 60 foot dam was all that was needed to develop the existing water power to the best advantage.

Purchase by Land Company.

In the year 1909 the Eastern Oregon Land Company became interested in the development of hydro-electric power in the Deschutes Cañon, and on August 5, 1909, that corporation acquired from Laughlin the option on the Sherar property, paying therefor $23,000 cash and undertaking to pay the further sum of $27,000. In December of the same year it acquired the adjacent properties of the Interior Development Company for $20,000 (see map—parcels colored blue). At this time the option on the Sherar properties was exercised and the first payment on account of the purchase price of $45,000 made.

Report of White & Co.

The Eastern Oregon Land Company employed Messrs. J. G. White & Company to make a report upon the proper development of the properties. The first, or preliminary report of White & Company was not made until the 3rd day of March, 1910. From this report it was made apparent that the construction of a dam of 100 feet in height was best suited to the full development of the property as a source of hydro-

Report of White & Co. (Continued.)

electric power and was therefore desirable. But the possibility of erecting a dam 100 feet high has been lost, as an agreement has been made granting to the Oregon Trunk Line the right to construct its road through the land, provided the road was constructed so as not to interfere with the maintenance of a 60 foot dam. This road was constructed at an elevation of between 70 and 71 feet above the low water level, as this height is essential to the maintenance of a 60 foot dam without interference with the operation of the road in time of high water (Tr., p. 393, *et seq.*).

Efficiency of a 60 foot dam.

A 60 foot dam would, according to estimates, furnish power sufficient to develop about 46,000 theoretical horsepower. The estimated capital investment required to develop and distribute the power to Portland and adjoining cities was $4,000,000, and the estimated power actually available for distribution was 40,500 horsepower (Tr., p. 269). Up to the present time $190,000 has been invested, a sum not included in the above estimate.

The value of the power site, and the result of the defendant's acts.

This project has, however, been seriously hampered by the construction of the road of the defendant company at a point where the maintenance of a 60 foot dam will result in the flooding of the road in time of high water. According to the testimony of G. A. Kyle, who was Chief Engineer of the Oregon Trunk Line and constructed the road of that company through the Deschutes Cañon, the value of the land in question has been depreciated $75,000 by the con-

The value of the power site, and the result of the defendant's acts. (Continued.)

struction of the defendant's road at the point at which it is built (Tr., p. 99). Estimates of damage done the project as a whole are much greater.

The power site is the best existing within the zone in which power can be developed and transmitted to Portland. See testimony of Mr. Kyle (Tr., p. 300). Even the defendant's witnesses declare that the site in question affords the best means for the largest and most economical development of power in Oregon. See testimony of Mr. Kelley (Tr., p. 467). Dillman and Thompson value the undeveloped land at $500,000.00, on account of the fact that power may be produced so cheaply (Tr., pp. 252 and 282).

THE RAILROAD PROJECTS.

The construction of a railroad along the line of the Deschutes River had been under consideration by both the Harriman and Hill roads for a number of years. In February, 1906, the Deschutes Railroad Company filed with the Secretary of the Interior a certified copy of its articles and a declaration of its intention to avail itself of the benefit of the Act of March 3, 1875, and acquire rights of way over the public lands pursuant to that Act. On November 5, 1908, the Railroad Company adopted a resolution defining its location, and on November 8, 1908, filed its profile with the Registrar of the United States Land Office. This map was subsequently approved on June 20, 1910.

NEGOTIATIONS BETWEEN THE RAILROAD AND PLAINTIFF'S PREDECESSORS IN INTEREST LOOKING TO THE ACQUISITION OF A RIGHT OF WAY.

Transactions between railroad and Sherar executors.

On August 9, 1909, Mr. J. W. Morrow, the right-of-way agent of the Railroad Company, called on Mr. Grimes, the managing executor of the Sherar estate, to discuss the matter of a right of way through the Sherar property. According to Mr. Morrow's testimony, the understanding arrived at was that the elevation of the line should be such that a dam sixty feet in height above low-water mark could be constructed (Tr., p. 348).

Letters of Huntington to Morrow.

Mr. Morrow subsequently had a conversation with Mr. Huntington, counsel for the Sherar executors, and the following communication to Mr. Morrow from Mr. Huntington sums up the situation as it existed at that time:

"August 25, 1909.

"Mr. J. W. Morrow,
c/o O. R. & N. Co.,
Portland, Oregon.

"Dear Sir:

"Confirming our telephone conversation of this afternoon the executors of the will of J. H. Sherar, deceased, and who also are attorneys in fact for several of the heirs are willing that the Deschutes Railroad Company shall proceed with the construction of its road across the Sherar lands in the Deschutes Canyon, provided the road is constructed sufficiently above the river *as* that it will not interfere with the use of the property for hydraulic purposes, and the persons who have agreed to purchase the property consent. The executors understand that if the persons who have

agreed to purchase do not take the property that your company will pay One thousand dollars for the right of way. *If the sale is consummated, as we assume it will be, then you are to settle with the purchasers for the right of way.*

"Yours very truly,
"HUNTINGTON & WILSON."

(See Transcript, p. 175.)

Huntington's account of transaction.

Mr. Huntington's account of the conversation preceding this letter is as follows:

"The conversation which led to the writing of that letter, as well as I can remember, was that Mr. Morrow called me to the phone and said that their contractors were very anxious to proceed with the construction work across the Sherar land and wanted to know if I, representing the heirs, would consent to their proceeding. I told him that we were not in position to give our consent; that we had contracted the land to the Eastern Oregon Land Company; that insofar as the heirs themselves were concerned, if the Eastern Oregon Land Company didn't take the land under the option, I thought the heirs would give their consent. Something was said about the price, and I think the price had been talked over before between Mr. Morrow and Mr. Grimes. Anyway, I had been advised that the price for the right of way, if the Eastern Oregon Land Company didn't take the land under the option, would be $1000, the company to so construct its road as not to interfere with the development of the water power at that point, and so as not to interfere with the toll roads which were owned by the heirs at that time; there were two toll roads which they crossed. But I told him that he would have to obtain the assent of the Eastern Oregon Land Company, and thereupon wrote him this letter in confirmation of the telephone conversation, which is as follows:"

(See Transcript, p. 174.)

In April, 1910, Mr. Morrow made an affidavit in which he said: *Morrow's affidavit.*

"That in the presence of J. P. O'Brien, G. W. Boschke, B. F. McLaughlin and myself, the said B. F. McLaughlin, representing himself as being in possession of an option to purchase the Sherar Estate property, when a general discussion was had with reference to the construction of a line of railroad over the same, said Laughlin urged that the road should be built at as high an elevation as possible; in fact, stating to the remaining three, who were representing the railroad interests, that if they would go as high with the grade as they could, they would be satisfied; when the chief engineer, by reference to his profile and maps, stated that it was possible to reach a height so that a dam sixty feet in height could be constructed, and this was agreed upon the part of Mr. Laughlin to be sufficient."

(See Transcript, pp. 358-359.)

And in his testimony in this case he also said: *Morrow's testimony.*

"In the interview between me and Mr. Grimes, when we went to Mr. Huntington's office, he reiterated the statement to Mr. Huntington which he had made to me, and it was understood then that we could go ahead and construct our line. *I think that I negotiated with these people upon the theory that the elevation to which the road should be built was sufficient to admit of the construction of a 60-foot dam.*"

(See Transcript, p. 361.)

And again in his testimony he stated:

"In all our negotiations with any parties interested in that property, the principal point of contention was the height of the dam; the power sites were always interested, in avoiding the possibility of interfering with the construction of the

dam, *and in all these negotiations the height was always at a 60-foot level above the low water flow of the Deschutes River according to my understanding of it, and I think that is right.*"

(See Transcript, p. 363.)

Summary of transaction.

Looking at that testimony and viewing it in the light of the fact that the Hill railroad (which was constructed through the Deschutes River in competition with and at the same time as the Deschutes Railroad) was built at an elevation sufficient to allow the maintenance of a sixty foot dam, it cannot be doubted that the agreements and negotiations between the representatives of the holders of the Sherar property and the Deschutes Railroad contemplated the entry and construction of a railroad over the lines of the Sherar property on the condition, and only on the condition, that the same was to be constructed and maintained so that the development of the power would not be interfered with. It is also apparent that most if not all parties interested believed that power development would not be interfered with if a sixty foot dam could be maintained. This much is absolutely clear from the Record, and, indeed, the lower court, in its opinion, practically affirms this as the condition. These same arrangements were made with the owners of the land of the Development Company and these representations repeated to Laughlin at a time at which it was assumed he was interested as the holder of the option granted by the Sherar heirs.

Summary of transaction. (Continued.)

On August 5, 1909, the Eastern Oregon Land Company acquired from Laughlin the option on the Sherar properties, and it was not until August 9th that Morrow began negotiations with Sherar's executors. The agreement with the executors of Sherar was expressly subject to disaffirmance by the purchaser under the options, if the options were exercised, and the fact that the Eastern Oregon Land Company then owned the option was disclosed. The best evidence of the terms of these agreements is contained in the letter from Huntington to Morrow putting in concrete form the understanding at which these gentlemen had arrived. The letter of August 25th, which put in writing the understanding between the parties, gave the right of way to the railroad on condition:

1. That the road be constructed sufficiently above the river to avoid all interference with the use of the property for hydro-electric purposes.
2. That consent of the prospective purchaser be obtained.
3. That a thousand dollars be paid for the right of way, if the option were not exercised.
4. That if the option were exercised, settlement for the right of way be made by the railroad with the purchaser.

As to the first condition, the oral evidence, both that given on the part of the Railroad Company and that given on the part of the Land Company, establishes conclusively that the defendant thoroughly understood that in order not to interfere with the use of the prop-

Summary of transaction. (Continued.)

erty as immediately contemplated, the road should be constructed so as to permit the maintenance of a dam sixty feet in height.

TRANSACTIONS BETWEEN PLAINTIFF AND DEFENDANT.

Transactions between Martin and Morrow.

Morrow states that he met Martin, president of plaintiff corporation, in the electric car running between Salem and Portland, on August 24th. The

Morrow's account.

meeting was casual, but Morrow testifies that at the time of this chance meeting he knew that the Eastern Oregon Land Company, of which Martin was president, was the holder of the option on the Sherar property, and he declares that he informed Martin of the arrangement which he had negotiated with the Sherar executors, and that Martin promptly consented on behalf of the Eastern Oregon Land Company.

Martin's account.

Martin's account of the conversation differs entirely from that of Morrow. Martin denied that he had assented to any arrangemnet or that the existing arrangement had been outlined. The conversation appears to have been casual. On August 25th, however, Morrow wrote to Huntington as follows:

Morrow's letter to Huntington.

"Huntington & Wilson, Attorneys at Law,
The Dalles, Oregon.

"Gentlemen:

"This will acknowledge receipt of your letter under date of August 25th confirming our conference and understanding over the contention with reference to the construction of our line through the Sherar's Estate property, for which I thank you very much. And at the same time I am pleased to ad-

vise that I talked this matter over with Mr. Martin of the Eastern Oregon Land Company, who has expressed a willingness to have us go upon the land to construct our line.

"Very truly yours."

Morrow's letter to Huntington. (Continued.)

(See Transcript, p. 353.)

It is possibly worthy of note that Morrow does not claim that Martin did anything more than to assent that they go on the land. *He does not here claim that Martin adopted the agreement of the Sherar heirs or waived any right to compensation.* On August 27th, Huntington, writing to Balfour, Guthrie & Company, the general agents in Portland of the Eastern Oregon Land Company, informed them that the arrangement between the Sherar heirs and Morrow was wholly subject to the approval of the Eastern Oregon Land Company, and that Mr. Morrow had sent a letter to him in which he stated that Mr. Martin of the Eastern Oregon Land Company had expressed a willingness to have the Railroad go upon the land to construct the line. The letter of August 27th from Huntington to Balfour, Guthrie & Company is as follows:

Huntington's letter to Balfour, Guthrie & Company.

"Messrs. Balfour, Guthrie & Company,
Portland, Oregon.

"Gentlemen:

"In re Sherar lands. We are in receipt of yours of the 27th and note your suggestions with respect to rights of way. The assent of the representatives of the Sherar heirs to the crossing of the lands is conditioned entirely upon their obtaining the assent of the Eastern Oregon Land Company or

Huntington's letter to Balfour, Guthrie & Company. (Continued.)

whatever person or company is the proposed purchaser under the Laughlin option. We have a letter from Mr. Morrow, dated yesterday, in which he states that he has seen Mr. Martin and obtained his consent that the Deschutes Company proceed to build across the lands. He said, 'I am pleased to advise that I talked this matter over with Mr. Martin, of the Eastern Oregon Land Company, who has expressed a willingness to have us go upon the land to construct our line.' The representatives of the heirs are fully aware that they have no right at this time to consent to anything with respect to a right of way only as it meets your entire approval. If you or Mr. Martin have not given consent to their proceeding with the construction of their road, it is obvious his, Morrow's, mind should be disabused of an apparent impression he has received from the conversation with Mr. Martin. In our telephone talk and in our letter confirming the same, we conditioned the assent of the heirs upon their obtaining the assent of the persons who have agreed to purchase the property, and Mr. Morrow must understand that we are not in any way consenting to any act which is not entirely assented to by you. No negotiations have been opened with the Oregon Trunk line as yet. We have advised their right of way agent that a sale of the property is about to be consummated and that we cannot grant any right of way only as it is done with the consent and approval of the purchasers. No payment will be accepted from either company for a right of way until it is determined whether or not this sale is to be consummated. Yours very truly,

"HUNTINGTON & WILSON."

(See Transcript, pp. 353-355.)

Summary.

It should be noted that if Morrow be correct in the statement contained in his letter, that is, if Martin actually assented to the arrangement made with the Sherar heirs, Martin merely assented to the following propositions:

(a) The construction of a railroad across the lands in such manner as not to interfere with the use of the property for hydraulic purposes. *Summary. (Continued.)*

(b) The payment of such compensation as might thereafter be fixed between the Eastern Oregon Land Company and the railroad, as the provision relating to the payment of One Thousand Dollars was confined to a purchase from the Sherars and was not to carry over and be binding upon their successors.

In other words, Martin waived condemnation proceedings and payment in advance of taking, on the condition that the line be located so as not to interfere with the development of power.

THE CONSTRUCTION OF THE RAILROAD.

As originally projected, the railroad followed the river on a water grade.

In March, 1909, before any negotiations took place between the railroad and the people interested in the land, a re-survey was made looking to the elevation of the line (Tr., p. 483). The order to commence work was given August 25, 1909 (Tr., p. 483), and the work commenced in September (Tr., p. 419). The grading was completed in April or May, 1910 (Tr., p. 423). Ties and rails were not laid until October, 1910. There was no railroad in existence on the land at the time this suit was commenced or at any time prior to October, 1910 (Tr., p. 423). The Re-Survey. The Commencement and Prosecution of Work.

As stated, the railroad entered upon the land and started grading in September, 1909.

The grade as constructed was over sixty feet above

The actual grade.

the mean low-water level of the river, so that a sixty-foot dam could be constructed and the maintenance of a dam of that height would not, except in time of flood, interfere with the operation of the road, save at the point at which the moving body of the stream entered the back water of the dam and produced a wave.

Whistler's Conversation with Boschke.

In October, 1909, Whistler, one of the engineers of the Eastern Oregon Land Company, called on Boschke, the engineer of the Railroad, in order to find out what the location of the line was going to be. Boschke showed Whistler certain profiles *which did not give the datum level,* but Boschke informed Whistler that the grade was seventy feet above the water line. Boschke says:

Boschke's account.

> "When I gave Mr. Whistler the profile, which seemingly was on the 29th of October, I may have discussed the height at which the grade was being constructed, and I may have informed Mr. Whistler that the road was being constructed at a height sufficient to permit the construction of a dam at the dam site of the Interior Development Company, 60 feet in height. I must have done it if it is in that affidavit; I probably did."
>
> (See Transcript, p. 339.)

Boschke's testimony shows, in all probability, the exact attitude the Railroad assumed towards the Land Company when Whistler called upon him; this testimony being as follows:[1]

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1 It should be borne in mind in this connection that the resurvey of the road was in existence and fully completed prior to August, 1909, and that this survey was made pursuant to directions given in March, 1909, before negotiations had been opened with any of the persons interested in the land in August, 1909 (Tr., p. 423).

"Q. How high a dam did you calculate could be built at the dam site without interfering with your road? *Boschke's account. (Continued.)*

"A. *I wasn't making any figures on the dam site at all, or the dam. I was building a railroad there, and building it as high as I could get up, starting at eight-tenths grade at the tunnel.*

"I think a dam readily could be built there 60 feet or over without flooding our track or right of way so as to interfere with our railroad, if the flood waters were properly taken care of.

"Q. Why weren't you building your road so as to guard against flood waters?

"A. As I said before, *my object was to build a railroad there, and I was ordered to build it as high as I could, going up the maximum grade from the tunnel, and there wasn't any dam built there at that time, and there wasn't any dam built there at that time, and there isn't to-day. In my opinion, though, a dam could be built there 60 feet, and probably would be all right, except might flood our slopes, and in that way soften them up and injure the railroad, where the slopes run down into the river."*

(See Transcript, p. 339.)

Summary.

In other words, the road was built along a line surveyed and determined on prior to negotiations with the land owners.[1] *No attempt was made to fulfill the promises given by the company to secure the right of entry, or to ascertain whether the line theretofore determined on would, if adhered to, be sufficiently high to comply with the obligation assumed* (Tr., p. 381).

Whistler's report to the Land Company.

Whistler reported to the Eastern Oregon Land Company that he had been unable to ascertain from the profile given him by Boschke the elevation of the road

[1] The resurvey was made after the conversation between Laughlin and O'Brien had taken place. In August, 1909, Laughlin transferred his option to the Land Company.

Whistler's report to the Land Company. (Continued.)

above the level of the river at the proposed dam site, but that Mr. Boschke had stated that from the information he had in his office he believed the elevation to be about seventy feet above water surface at the dam site.[1] In Boschke's account of what took place, he says:

Boschke's testimony.

> "He (Mr. Whistler) spoke of the upper end, the way our grade lay, where the water came down, coming down the natural grade of the river, would reach the water backed up from the dam; it would probably flood our grade in there. *I said to him, that part of it, we would readily change that when the time came; when he had a dam there, but I did not believe in spending any money to change that at this time.*"
>
> (See Transcript, p. 333.)

Conduct of the Land Company.

After receiving this information from Whistler, the Land Company employed J. G. White & Company to report (Tr., pp. 506-7). Their report was made in March, 1910 (Tr., p. 184). Prior to receiving the White report, the Land Company did not know what had been done (Tr., pp. 186, 204). Indeed, Owre, the engineer in charge of construction of the railroad, declared that in December, 1909, it was not apparent at the dam site where the grade would be located (Tr., p. 403).

In February, 1910, legal title to the Sherar properties was vested in the Eastern Oregon Land Company and promptly after the acquisition of title and the receipt of the report of J. G. White & Company by

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1 Whistler made two visits to Boschke, one on October 6th and one on October 29th. On both occasions Whistler was assured that the elevation of the road was sufficient to permit construction of a 60-foot dam. After the first visit, he expressed doubt as to the truth of the statement, which lead to the employment of White & Co.

which the Eastern Oregon Land Company was informed that the construction of a 100 foot dam was desirable; that the line on which the grade of the railroad had been constructed was such that the maintenance of a dam sixty feet in height would result in the flooding of the railroad tracks during high water —this proceeding was commenced.

Conduct of the Land Company. (Continued.)

PLEADINGS AND PROCEEDINGS IN THE LOWER COURT.

On April 18, 1910, before any rail was put down, the Eastern Oregon Land Company filed its bill in the United States Circuit Court for the District of Oregon. The object of the action was to restrain the Deschutes Railroad Company from constructing a railroad across the lands of the plaintiff. The bill alleged that the defendant had entered upon the property of the Land Company without right or authority and was engaged in constructing the road. It was further charged that the line on which the defendant company was proceeding to construct its road would, if adhered to, prevent the Land Company from utilizing its land for the storage of water and development of power, a use to which the land was peculiarly adapted.

The original bill and petition for preliminary injunction.

The defendant resisted the issuance of a preliminary injunction, asserting in the affidavits presented by it the following claims:

Grounds upon which the issuance of the injunction was resisted.

(a) The Railroad Company entered upon the property under a license by which it was permitted to enter upon the property and con-

Grounds upon which the issuance of the injunction was resisted. (Continued.)

struct its line at a point which would permit the construction of a dam 60 feet above low water.

(b) This license was granted by plaintiff's predecessors in interest at a time at which plaintiff was the holder of an option to purchase the property, and plaintiff knew this license had been granted and approved and sanctioned the grant and concurred therein.

(c) The line on which the road was located was more than 60 feet above low water and permitted the construction of a 60 foot dam.

Decision denying preliminary injunction.

The Circuit Court refused to grant a preliminary injunction, basing its decision on the ground that the entry on the land was made with the consent of the then owner *and that the purchaser was at liberty to construct a dam sixty feet high and that in any event this was all it could do before final hearing.*

The amended bill.

On June 4, 1910, after the preliminary injunction had been refused for the reasons stated, an amended complaint was filed. In this bill it was alleged that the Land Company was the owner and in possession of the real property situate in the Deschutes Cañon, which had been purchased for the express purpose of generating hydro-electric power; that in the execution of this object, plaintiff had expended large amounts of money. The entry of the Railroad Company upon the lands without right was again alleged, and it was further charged that if the railroad were constructed along the proposed line, the value of the

lands would be seriously impaired, as the grade adopted would prevent the construction of a dam of more than 54 feet in height. It was further charged that the defendant claimed that it had entered on the land and commenced construction under a license given by the plaintiff and its predecessors in interest, one of the conditions of such asserted license being that the defendant was to so locate its line as to permit the construction of a dam sixty feet in height. The complaint alleged that no such license had been granted by plaintiff, and inquiries from the predecessors in interest of plaintiff elicited the information that no such license had been given by them. But, under any circumstances, the line as located did not conform to the license asserted, as the line was so located that a dam of only 54 feet could be maintained. This complaint further charged that, in grading on its proposed line, the defendant had thrown large quantities of rock and earth over other lands of the plaintiff, occasioning damage thereby.

The amended bill. (Continued.)

The second amended complaint, upon which the case was tried, is much more elaborate than the original pleadings. This pleading deraigns the plaintiff's title to various parcels of land, and contains a detailed statement of facts not here recapitulated, though all material facts are set forth.

Second amended bill.

The answer of the defendant interposes various defenses, which may be summarized as follows:

The Answer.

Defenses Interposed.

1. It is claimed that as plaintiff acquired legal title after the entry of the defendant and the partial construction of the grade, the plaintiff cannot maintain the action.

2. That the defendant entered into possession under an agreement with Laughlin by which it was provided that, if the road should be constructed as high as the same could conveniently be raised without making the expense prohibitive and without interfering with the proper and convenient operation of the line, the damages would be nominal; that Laughlin and the Interior Development Company at all times knew where the road was located and never protested; that the Sherar heirs knew of the actual location of the line and approved the same; that the consent of complainant was expressly obtained and complainant agreed to accept the sum of one thousand dollars compensation if it exercised its option on the Sherar properties.

3. That the road was so constructed that a dam 60 feet high could be maintained.

4. That by filing its map of definite location, the right of way of the defendant took priority over the title of plaintiff to the parcels of land on which the lieu selections of 1906 were contested and to which patent did not issue till 1913.

Prayer for equitable condemnation.

The answer concludes with a prayer to the effect that equitable condemnation be decreed to such extent as may be necessary, in the event the other defenses set up do not prevail.

THE DECISION.

The Opinion of the Lower Court.

The decision of the lower court rested on two propositions of law:

First opinion.

1. The court was of the opinion that in view of the fact that plaintiff did not exercise its option and purchase the Sherar property until after the railroad had entered into possession and commenced construction, ejectment did not lie and damages alone could be recovered.

2. That plaintiff was not the person entitled to recover damages, as it paid the purchase price and acquired the legal title to both the Sherar and Development Company properties after the defendant was in actual possession.

Second opinion rendered on rehearing

On rehearing the court modified its views. As to part of the land in controversy, viz., that purchased from Sherar under the option, the court practically repudiated the original decision and declared that the plaintiff was entitled to maintain the action and that equitable condemnation should be decreed as to part of the land occupied.

The conclusion ultimately reached.

The decision on rehearing was to the following effect:

(a) So far as property acquired from the Interior Development Company was concerned:

The court adhered to the view expressed in the original opinion.

(b) As to property acquired from the Sherars, for which the United States patents did not issue

The conclusion ultimately reached. (Continued.)

till 1913, on account of the contest initiated between Sherar and the Development Company in 1906:

The court held that the title of the Railroad was superior to the title of the Sherars.

(This portion of the decision merely followed the rule declared in the decision of Judge Bean in *Daniels* v. *Wagner*, and affirmed by this court, 205 Fed., 235. This decision has since been reversed by the United States Supreme Court, 237 U. S., 547.)

(c) As to other property acquired from the Sherars:

1. The court concluded that as the plaintiff purchased pursuant to an option outstanding at the time the defendant entered upon the land, the original opinion was erroneous and plaintiff had a right to maintain the action.

2. That equitable condemnation be decreed.

3. Concerning compensation, the court said:

"The evidence shows that the defendant railway is located along the sides of a steep canyon over land of but little if any substantial value. There is no evidence in the record as to the quantity of land occupied by the road nor its value, but since the defendant admits and alleges that it agreed to pay the Sherar heirs a thousand dollars for the right of way in case the holder of the option did not purchase, I assume in the absence of other evidence that such an amount is a reasonable compensation to be paid for the land taken.

"A decree will therefore be entered adjudging that defendant is the owner of a right of way 200 feet wide over and across the land."

(See Transcript, pp. 124-125.)

THE FINAL DECREE.

By the final decree it is adjudged:

(a) Concerning the N½ of the SW¼ of Sec. 35, Township 3, and Lot 2, Sec. 3, Township 4 (This is the land designated "C" on the map, of which Sherar was in possession since 1871; on which he filed a lieu selection in 1906, and to which he obtained a patent in 1913; the claim of the Railroad being based on a map of definite location filed November, 1908): The Sherar Bridge Properties.

1. "That the defendant is the owner of a right of way two hundred feet in width, being one hundred feet on each side of the center line of its railroad track as constructed over and across this property."

2. "That the title of complainant to said property was acquired subsequent to the acquirement of said right of way of defendant over said property and the same is subject to such right of way, provided, however, that the right thereby decreed to defendant shall not be understood or considered to interfere with or deprive complainant or its successor in interest of the right to construct and maintain a dam for hydraulic purposes in the Deschutes River where it passes through such property and installing in connection therewith appliances for the purpose of developing hydraulic and electric power for all purposes, provided the track or roadbed of defendant shall not thereby be flooded or damaged, or the operating of its road interfered with."

(See Transcript, pp. 126-127.)

(b) Concerning SE¼ of Sec. 34, Township 3, SW¼ of NE¼, the W½ of SE¼, the E½ of SW¼ of Sec. 3, the NW¼ and the NW¼ of the SW ¼ of Sec. 10, Township 4 (This is part of the land patented to Sherar prior to January 27th, 1906, and conveyed to Other Sherar lands actually crossed by railroad.

Other Sherar lands actually crossed by railroad. (Continued.)

plaintiff, the railroad being actually located thereon.), the decree declares:

"It appearing to the court that the defendant has paid into the registry of this court the sum of one thousand dollars in accordance with the opinion of this court, rendered and filed on the 12th day of October, 1914, it is hereby ordered, adjudged and decreed that the said defendant be, and it is hereby, decreed to be the owner of a right of way for its line of railroad as now constructed over and across the said land."

"That the defendant, its lessees, successors and assigns be and they are hereby declared to have the right to maintain the railroad of defendant as now located and constructed over said lands, together with necessary cuts, slopes and safe supports therefor, and the right to maintain and operate its trains thereover without interference on the part of complainant, its officers, agents, servants or employees, in any manner whatsoever, except as permitted by this decree."

(See Transcript, pp. 128-129.)

Sherar land embraced in reservoir site but not crossed by road.

(c) Concerning the other land purchased by plaintiff for a reservoir site, of which the property above described is but an integral part, the decree declares:

"It is further adjudged and decreed that the line of railroad of the defendant, Deschutes Railroad Company, does not cross or touch the same."

"* * * and said lands are immaterial to this controversy."

(See Transcript, p. 129.)

(d) Concerning Lot 1, Sec. 3, Township 3, and the NE¼ of the SE¼ of Sec. 9, Township 4 (this being the land purchased from the Interior Development Company) the decree is as follows:

Land acquired from the Interior Development Company.

1. "That defendant's line of railroad was constructed over and across the land at the place where it is now located pursuant to and in accordance with an agreement entered into between the defendant and the Interior Development Company, the owner of the tract of land at the time of said agreement with the defendant, and at the time of the entry thereon and the construction thereover of defendant's line of railroad, it being understood and agreed that the location of defendant's track should not interfere with or deprive the Development Company and its successor in interest of the right to construct and maintain a dam in the Deschutes River where it flows through such property, for hydraulic purposes, and to install in connection therewith appliances for the purpose of developing hydraulic and electric power for all purposes, provided, however, that the track and roadbed of defendant should not thereby be flooded or damaged or the operation of its road interfered with."

2. That complainant acquired this property "after the construction thereover of the defendant's line of railroad and subject to defendant's right of way thereover, and the defendant is hereby decreed to be the owner of a right of way over and across said lands for its tracks and roadbed and the slopes and cuts thereof and the necessary and safe support therefor, and for the safe and convenient operation of its line as hereinbefore set out, and it is adjudged and decreed that the complainant, its officers, agents, servants and employees, and all persons acting by, under or for it, be and they are hereby restrained and enjoined from in any manner interfering with the maintenance of said railroad over said lands, and from interfering with or obstructing in any manner the operation of said line of railroad over said property, except as permitted by this decree."

(See Transcript, pp. 127-128.)

THE EFFECT OF THE DECREE.

It is quite apparent that as a result of the decree the location of the defendant's railroad is in all respects confirmed and approved, regardless of its effect upon the value and utility upon the property of plaintiff as a whole, the plaintiff being awarded $1000 as compensation for a right of way about four miles in length.

It is equally apparent that the decree should not be sustained unless,

1. The plaintiff has lost its right to object, as a result of some agreement made by itself or by its predecessors in interest, or
2. The plaintiff has as a result of some improper conduct been estopped from asserting any claim of damages.

It is also clear that a portion of the decree must be reversed unless the title acquired by Sherar as a result of his occupation of a part of the property since 1871, his lieu selection made in 1906, and his patent issued in 1913, is subordinate to the right acquired by the railroad through filing its map of definite location in November, 1908.

Again, the decree must be reversed unless the sum of $1000 awarded to plaintiff in equitable condemnation is shown by the evidence to be the fair value of the property taken. And on this question the burden of proof is on the defendant.

ASSIGNMENT OF ERRORS.

I.

The court erred in declaring that the defendant had by virtue of its location in 1908 acquired a right of way over the N½ of SW¼ of Sec. 30, Township 3, and Lot 2, Sec. 3, Township 4, superior to plaintiff's title to that property.

II.

The court erred in not declaring that plaintiff was entitled to erect and maintain a dam 60 feet high irrespective of the effect thereof upon the railroad of the defendant.

III.

The court erred in failing to award to the plaintiff damages sufficient to fairly compensate it for the injury suffered by reason of the construction of the road and the acts complained of.

IV.

The court erred in declaring that $1000 was fair compensation for the right of way awarded to defendant over the property of plaintiff.

Summary of questions presented for review.

ARGUMENT.

The evidence in this case shows without conflict that plaintiff is the owner of a tract primarily valuable for the production of hydro-electric power; that plaintiff has expended in the acquisition of this property and in preparation for the development of hydro-electric power thereon, $190,000.00; that the construction of the defendant's railway across this land has substantially lessened its value.

In view of these facts, it is obvious that plaintiff is entitled to relief and to substantial damages if equitable condemnation be decreed, unless on account of the existence of other facts this right has been lost or waived.

The defendant asserts two grounds for the claim that plaintiff is not entitled to substantial relief:

(a) That the plaintiff's title to the Sherar Dam Site is subordinate to defendant's easement of a right of way; that this fact of itself destroyed the power possibilities of the property as a whole.

(b) 1. That plaintiff's predecessors in interest entered into a contract with defendant by which it was agreed that all claims of damage would be waived should defendant raise the elevation of its grade to as high a point as it might find both convenient and economical; that defendant performed its contract and expended $100,000 in raising its grade.

Summary of questions presented for review. (Continued.)

2. That the plaintiff had notice of this agreement at the time it exercised its option.

3. That the plaintiff is estopped from claiming that the grade adopted does not conform to the contract.

In the last opinion rendered by the lower court, and in the final decree, the court rests the decision on the claim based on title, not the claim based on contract and estoppel. In the first opinion the court expressed an inclination to support the claim of estoppel, but based its decision on other grounds.

In the view we take of the case, the claims are inconsistent. If the case is to be decided on the basis of contract, the question of title becomes immaterial. However, neither claim affords support to the decree. The claim of title is admittedly based on a decision since overruled by the Supreme Court. The contract asserted differs radically from the contract disclosed by the evidence. The claim of estoppel is shown to be without foundation by the evidence of the defendant.

PART I.

THE TITLE OF PLAINTIFF TO LOT 1 OF SEC. 3, AND THE NE¼ OF THE SE¼ OF SEC. 9, TOWNSHIP 4, RANGE 14 EAST, W. M., WAS NOT SUBJECT TO AN EASEMENT VESTING IN THE RAILROAD COMPANY THE RIGHT TO CONSTRUCT ITS RAILWAY ACROSS THE SAME.

History of Sherar's title.

The history of the Sherar title to the land above mentioned is set out in the decision of Mr. Pierce, First Assistant Secretary of the Interior. The following is a quotation from the opinion rendered in disposing of the contest which arose between Sherar and the Interior Development Company over this property:

* * * * * * *

The decision of the Land Department.

"On January 26, 1906, the Santa Fe Pacific Railroad Company by A. L. Veazie, attorney in fact, filed selection under the act of June 4, 1897 (30 Sta., 36) for the above described tracts * * *"

* * * * * * *

"On February 13, 1906, the Santa Fe Pacific Railroad Company, by J. H. Sherar, attorney in fact, presented three applications to select under the act of June 4, 1897, which included these same tracts, together with a duly corroborated affidavit of protest: (1) that at the date of the said lieu land selection was made by the said A. L. Veazie no portion of said land was vacant land opened to settlement; (2) that each and every legal subdivision thereof was at the date of said selection occupied by said protestant under a claim of ownership, and had been so occupied for more than four years prior to the date of said selection; (3) that no portion of said above described tracts at the date of said selection was vacant land open to settlement, but each and every subdivision thereof was and had been occupied and in

the exclusive possession of the protestant for more than twenty-five years prior to the date of said selection."

* * * * * * *

"In 1871, J. H. Sherar bought out the interest of a predecessor, the purchase including a toll bridge across the Deschutes River, and his place was thereafter known as Sherar's Bridge. The land at the time was not surveyed. According to his statement, he paid six thousand dollars 'for the road and the land rights; I paid six thousand dollars for the road and the land along the river there.' Sherar claimed that the land included in his purchase was 'that along up and down the river from the mouth of White River down to the mouth of Buck Hollow.' After the public surveys were extended over that section of country, Sherar made homestead entry for the SE¼ Sec. 34, T. 3 S., R. 14 E. At the time he made such entry he supposed that it included the falls in the river, and not until 1901 did he discover that the south line of his homestead did not run south of said falls. He then took steps to acquire title to the land upon which the falls are situated, as well as the SE¼ NW¼ Sec. 3, and the N½ SW¼ Sec. 35. He already owned, in addition to his homestead, the SW¼ NE¼ Sec. 3, and other lands up the Deschutes River toward the mouth of White River.

"The lands in question were included in a selection list, of the State of Oregon. They were sold by the State to Annette Mitchell, a clerk in the office of Sherar's agent at The Dalles, who assigned her certificate to Sherar June 7, 1901. From that time until Veazie's selection, it appears that Sherar believed that he was the owner of these tracts, or was in a position to acquire title thereto.

* * * * * * *

"From 1871 Sherar continued to reside in the canyon, and to use and occupy the lands therein, both above and below the bridge, until his death. He was engaged in building and repairing roads and in the sheep business. These lands were used by him in the same way as the

The decision of the Land Department. (Continued.)

lands embraced in his homestead, which was not fenced because it was deemed unnecessary on account of the character and location of the land. He supposed he owned the NW¼ NE¼ Sec. 3, on which the falls are located, because in his original purchase he had paid for the possessory right thereto, along with other lands. The forty was crossed by his toll roads on both sides of the river. He had, and used, a private road on the east side of the river, between the toll road and the river. On the west side and near the falls he for many years maintained a hydraulic ram for the purpose of supplying his home with water. A wing dam, about one hundred feet in length, was built out into the river. This forty was also used by Sherar as a feeding and bedding ground for his sheep. He also built a fish house, with a canal or flume leading thereto. The remains of these improvements may still be seen. The N½ SW¼ Sec. 35 is about equally divided by the Deschutes River. The N½ of the eighty is practically inaccessible except through an enclosure on Sherar's homestead, and was used by him as a hog pasture and lambing ground. It was also used as a place for catching drift wood coming down the river, and a private roadway was constructed by Sherar which ran nearly to the center of Sec. 35 and over which he hauled drift wood and feed for his sheep. The south of the eighty was used principally for grazing purposes.

"The evidence shows that Sherar used the lands for the purposes for which they were best adapted.

* * * * * * *

"The lands were generally recognized as belonging to or claimed by him; not only that, but they were so recognized and treated by the Interior Development Company, the ultimate beneficiary of the Veazie selection. In 1905, after looking over the premises, a representative of that company offered Sherar sixty thousand dollars for his holdings, including the lands in controversy. Again, in 1906, an option for five thousand dollars was executed by Sherar and his wife agreeing to convey their holdings to a repre-

The decision of the Land Department. (Continued.)

sentative of the Interior Development Company, for a consideration of seventy-five thousand dollars. This option covered all the lands in the canyon from Buck Hollow to the mouth of White River. The option was never exercised, it evidently being considered that possession of the valuable water power site could be secured at less cost through other means. The transaction shows, however, that the parties interest in the Veazie selection had full knowledge of the status of the lands in the canyon, and but confirms Sherar's claim of occupancy. There was evidently something on or in connection with these lands which charged parties with notice of Sherar's claim thereto. This is evidenced by the attempt to purchase his rights before the Veazie selection was made.

"It is not deemed necessary in this connection to discuss at any length the rules and decisions governing determination of what is or is not 'vacant land' within the meaning of the law generally, or under the particular Act of June 4, 1897. It is well settled under the authorities that any visible or notorious acts clearly evidencing an intention to claim ownership are sufficient to establish adverse possession. For this purpose there need not be a fence, building or other improvements. If a person claiming land exercises acts of ownership over it, using it for the purposes to which it is adapted, he may be regarded as in actual occupancy. In the case of *Jones* vs. *Arthur* (28 L. D., 234) it is said:

"'It is true that the tract has been only partially improved and cultivated, but it had been used and occupied in connection with other lands for twenty-three years preceding the entry of Arthur, by those who beyond question must have believed their title to be good particularly as warranty deeds were passed by the State.'"

(See Transcript, pp. 613-614, 617-621.)

Sherar selection.

Sherar's selections were made in February, 1906, almost three years before the Railroad Company filed its profile with the Registrar, viz., November 8th, 1908. Owing to the contest between Sherar and the Interior Development Company, which was not decided until 1909, Sherar did not establish his right to these lands till that date. But in April, 1906, the first temporary withdrawal order was made for irrigation works. This order was made more than two years before the railroad's map of location was filed. In February, 1913, the selections of Sherar were approved, the withdrawals canceled, and the patents issued; all for the purpose of recognizing Sherar's equities.

First withdrawal order.

Issuance of patent.

It is, of course, true that legal title did not vest in Sherar or his successors until the final approval of his selection and the issuance of patent. It is also true that there intervened between the date of the presentation of the selection and the date of approval,

1. The temporary withdrawal orders.

2. The filing by the Railroad of its map of location.

Daniels v. Wagner.

Prior to the decision of the Supreme Court in *Daniels* v. *Wagner,* 237 U. S., 547, it had been held by Judge Bean and also by this court that the rights of one making a lieu selection under the Act of June 4, 1897, were wholly inchoate and did not confer any equitable interest or estate until the acceptance of the offer and approval of the department; that as a

consequence, if any title or right intervened, it took priority to the lieu selection. In *Daniels* v. *Wagner,* 237 U. S., 547, these decisions were overruled, the court holding that one presenting a lieu selection and complying with the laws and regulations of the department obtained a full equitable title at once; that no discretion was vested in the department and the right of the selector was prior to that of a subsequent patentee. This case reversed the decision of Judge Bean in *Daniels* v. *Wagner,* 194 Fed., 973, affirmed by this court in 205 Fed., 235.

These decisions since reversed by the Supreme Court are admittedly the basis of that portion of the decision of the case at bar now under consideration. Indeed, this is declared to be so in the opinion of the lower court, where it is said:

> "In my judgment the subsequent approval of a prior application of the Santa Fe Railroad Company by its attorney in fact to select such lands in lieu of other lands under the Act of June 4, 1897, did not relate back to the date of the application and supersede the rights of the railway company acquired by the approval of its map of definite location. The right of selection given by the Act of June 4, 1897, is but an offer by the government to exchange one tract of land for another and the selector obtains no right or interest to the lands selected by him until the offer is accepted by the proper government officers. His rights in this respect are, I think, to be distinguished from those of a settler under the homestead or preemption laws or a claimant under the mining laws, or the rights of a railway company under a Congressional Grant to aid in the construction of its road in lieu of lands

which are lost in place limits" (*Daniel* vs. *Wagner,* 205 Fed., 235).

(See Transcript, p. 123.)

The rights of Sherar acquired under the lieu selection are prior to the rights of the Railroad.

As the decision of the Supreme Court in *Daniels* v. *Wagner* destroys the very basis on which the opinion rests, and as it is well settled that the Act of March 3, 1875, does not operate to convey a right of way over land in the possession of one who has taken all steps within his power to acquire title and has the right to acquire title thereto (*Washington & Idaho R. R.* v. *Ostorm,* 160 U. S., 103; *Spokane Falls Ry.* v. *Ziegler,* 167 U. S., 73), the decision in the case at bar is erroneous.[1]

Indeed, the Railroad Company never acquired a right of way over the land in question, irrespective of the rights of Sherar under his lieu selection.

THE RAILROAD COMPANY NEVER OBTAINED A RIGHT OF WAY OVER THE SHERAR BRIDGE PROPERTIES UNDER THE ACT OF MARCH 3, 1875.

On February 13, 1906, J. H. Sherar made and filed his lieu selection of the land in question.

Withdrawal orders.

On April 26, 1906, all land in Township 3 was temporarily withdrawn for irrigation works, pursuant to the power conferred by the Act of June 17, 1902. On October 24, 1908, a similar withdrawal was made of lands in Sec. 3, Township 4. Thus, all this land was withdrawn prior to November 8, 1908, the day on which the Railroad filed its map of location.

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1 It is well settled that though delay occur in the issuance of a patent, the rights of the patentee are not prejudiced thereby, but the patent relates to the time at which his right to it was complete.

Cosmos v. Gray Eagle Co., 112 Fed., 4, 11; 23 Sup. Ct., 696;
Santa Fe v. Nor. Pac., 38 Land Dec., 402;
Weyerhauser v. Hoyt, 219 U. S., 380; 31 Sup. Ct., 300.

Act of March 3, 1875, has no application to withdrawn lands.

The Act of March 3, 1875, does not, of course, operate to grant a right of way over land withdrawn for such purposes as this. Indeed, such right of way would seriously impair the object of the withdrawal. In the case of the *Grand Canyon Scenic Ry. Co.* 36 L. D., 394, Secretary Garfield said:

Scenic Railway case.

> "The Grand Canyon Scenic Railway Company has appealed to the Department from your office decision of February 27, 1908, rejecting its applications for rights of way, under the provision of the act of March 3, 1875 (18 Stat., 482), over lands reserved by the President's proclamation of January 11, 1908, on account of the creation of the Grand Canyon National Monument.
>
> "The reservation made by said proclamation is authorized by the act of June 8, 1906 (34 Stat., 225), and by the express terms of the proclamation all the lands covered thereby are—
>
> "'reserved from appropriation and use of all kinds under all of the public land laws, subject to all prior, valid adverse claims.'
>
> "Unless, therefore, the railway company had, at the date of the creation of the Grand Canyon National Monument, initiated a prior, valid adverse claim, the Department is without authority to approve its applications for rights of way. It is clear also that the existence of such claim depends upon actual construction of the road for which right of way is sought and not upon the filing and approval of maps of definite location, as no maps were tendered for approval until after the reservation was made."

Ruling of Secretary Hitchock

The opinion of Assistant Attorney General Campbell, approved and adopted by Secretary Hitchcock, is also directly in point. The opinion declares that no rights can be acquired by railroads under the Act of

Ruling of Secretary Hitchcock (Continued.)

March 3, 1875, over land withdrawn for irrigation work pursuant to the Act of June 17, 1902 (32 L. D., 597).

Any question which might arise concerning the interpretation of the Act of March 3, 1875, is settled by Sec. 5 of the Act itself, which declares:

Sec. 5 of the Act of March 3, 1875.

> "That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands especially reserved from sale, unless such right of way shall be provided for by treaty-stipulation or by act of Congress heretofore passed (18 Stat. L., 483)."

6 *F. S. A.*, 506-507.

The third section of the Act of June 17, 1902, pursuant to which the withdrawals in question were made, in terms prohibited any entry on lands while temporarily withdrawn pursuant to the directions of the statute.

7 *F. S. A.*, 1099.

U. S. v. Hanson.

In *U. S.* v. *Hanson,* 167 Fed., 881, the court held that no right could be initiated on public land after the same had been withdrawn for the purpose of establishing irrigation works thereon, until the withdrawal was set aside. This case points the distinction between lands withdrawn for the purpose of establishing irrigation works thereon, and lands withdrawn for the purpose of subjecting them to irrigation and subsequent sale.

Summary.

Thus, when the original map of location was approved June 20, 1910, the act of approval did not operate to give title to the Railroad over the lands in question which were not subject to the provisions of the Act of 1875 either at the time the map was filed or on the date of its approval. Indeed, on July 2, 1910, the President, acting under the Act of June 25, 1910, confirmed and continued in force these prior withdrawal orders. This condition subsisted "until "February 25, 1913, when the withdrawal orders "were canceled as to the lands included in said selec- "tions of Joseph H. Sherar, in order to allow patents "to issue on said lieu selections" (See Transcript, p. 163), and the patents issued simultaneously with the cancellation of the orders.

We respectfully submit that the decision of the lower court is erroneous not only for the reasons stated in *Daniels* v. *Wagner,* 237 U. S., 547, but for the further reason that at the time the profile map was filed, the lands in question were not subject to the Act of 1875, and that the subsequent cancellation of the withdrawal orders was made by the President for the purpose of patenting the land to Sherar's successors, and was no more than a recognition by the President of Sherar's full, equitable right.

PART II.

THE RIGHT OF THE PLAINTIFF TO OBJECT TO THE LOCATION OF THE ROAD AS NOW CONSTRUCTED WAS NOT LOST BY REASON OF ANY AGREEMENT BETWEEN LAUGHLIN AND THE RAILROAD COMPANY.

The road as constructed is jeopardized in time of flood by the maintenance of a fifty-five foot dam. In order to justify the existing condition, the Railroad Company claimed that Laughlin, from whom the Land Company acquired the option over the Sherar property, had assented to the construction of the road provided a 55-foot dam might be maintained. It was also asserted that this arrangement was binding on the plaintiff.

NEGOTIATIONS BETWEEN LAUGHLIN AND THE RAILROAD COMPANY.

Mr. O'Brien, vice-president of the Deschutes Railroad Company, testified on his direct examination as follows:

Testimony of O'Brien.

> "He (Laughlin) asked me how high we could get up in the air at Sherar's. I told him I did not know. That would be a question of cost. As a result of it, I sent for Mr. Boschke, our chief engineer, who has charge of running the lines. I told Mr. Boschke to run a line there and see how far he could get up at Sherar's without making the cost prohibitive. I asked Mr. Boschke in a general way if he had any idea or if he could get any idea from the data he had in his possession at that time, as to how high he could go without making the cost prohibitive, and he said, in

the neighborhood of 58 or 60 feet, along in there. I asked Mr. Laughlin if that would be satisfactory at that height, along in there between 58 and 60 feet. Mr. Laughlin said he thought that would be satisfactory. Of course, any height that we could go above where the line was laid at that time was going to help them out."

(See Transcript, p. 318.)

"I asked Mr. Laughlin, when we got along in our discussion of the matter, in a general way, I asked him how about the right of way. And I said we were spending a great deal of money in building the line; that the line was going to overrun badly on account of our not figuring on these different power propositions, and it was of considerable concern to me for the reason that I had recommended the line very strongly to our principals in the east; that I had submitted an estimate covering about what the approximate cost would be, and I knew from the figures that were at hand at that time, that the cost was going to be greatly exceeded, and I asked how about the question of right of way. He said he did not think there would be any question about the right of way; would be glad to give the right of way free."

(See Transcript, pp. 319-320.)

"Q. Did you in the presence of Mr. Laughlin, at that conference, or at any time, instruct Mr. Boschke to go and constuct that line up in the air as high as he could possibly get, and protect the power site at that point, irrespective of expense?

"A. I did not. I told Mr. Boschke to run lines there and see how high he could go without the cost being prohibitive. Mr. Boschke indicated at that time that the cost would be considerable. He said it was going to cost a great deal of money to get up in the air.

"Q. Did you, or did you not, instruct Mr. Boschke that

Testimony of O'Brien. (Continued.)

no matter what the cost was, he should get the line up in the air?

"A. I did. I said to him that we were interested in the development of cheap power; that anything—while it might cost us considerable money, that any money that was spent might come back to us again.

"Q. I don't believe he quite understands the question. I will ask to have it read. (Question read.)

"A. No, sir, I did not. I thought I answered that a few moments ago. I told him to make survey so as to see how high he could get in the air, how high he could get the line up without the cost being prohibitive.

"There was a resurvey made in response to that instruction. That was made shortly afterwards. I instructed Mr. Boschke to take immediate action on the matter."

(See Transcript, pp. 320-321.)

"Q. In Mr. Laughlin's deposition he has testified to the effect that he indicated to you that you should go up in the air, and that you should pay him whatever sum of money you should damage him wherever the line was constructed.

"A. He had no such arrangement with me, or had no such talk with me. The question of damage was never touched upon. It was simply a question of how far we could get up in order to give him the additional height, in order to develop his power. It was thoroughly understood that the whole question depended, from my standpoint, on the question of how much money we could afford to spend there, without making the line so expensive that we would have to give it up.

"Q. And you did that, did you, to satisfy Mr. Laughlin in connection with your understanding there with him?

"A. I suppose that I had. Mr. Laughlin expressed himself as well pleased with what we had done—the instructions that I had issued to Mr. Boschke, and as I said before, when I asked Mr. Boschke about how high he could get, if he could give an opinion as to how high he could go, or how high he thought he could go, on the data at hand, he

said between *55 and 60 feet,* and Mr. Laughlin seemed to be well pleased with that." Testimony of O'Brien. (Continued.)

(See Transcript, p. 322.)

On cross-examination he said:

"The railroad company was anxious to preserve the power sites along the river, anything that would furnish cheap power. We hope it may be of value to the railroad company."

"Mr. Laughlin stated to me that his interest was in the Interior Development Company, *and that was the basis on which he was negotiating with me,* otherwise I would not have been discussing the matter with him."

(See Transcript, pp. 324-325.)

"The conference with Mr. Laughlin was early in the Spring of 1909. I was under the impression that it was in March or April. I don't think it was later."

(See Transcript, p. 326.)

Mr. Boschke, the chief engineer, also testified to the conversation between Laughlin and O'Brien. He said: Testimony of Boschke.

"I heard the testimony of Mr. O'Brien who preceded me, and recall the conversation which he referred to between himself, Mr. Laughlin, and myself. I cannot say exactly what time it took place. It was in the early part of 1909."

"The line was located at that time on the water grade line along the river. That location had been made some time in 1908."

(See Transcript, p. 327.)

"Q. And what was said, if anything, at that conference with reference to changing the grade?

Testimony of Boschke. (Continued.)

"A. Well, they wanted us to change the grade so as to enable them to build a power site at that point, Sherar's Bridge, and Mr. Laughlin said that anything we could raise the grade there would be of great assistance to him. I had not at that time definite data as to the exact height to which the grade could be raised.

"Q. Did you indicate or had you any information by which you gave any information as to what you thought you could do?

"A. Well, I had the length of the line from the tunnel to the dam site, and our maximum grade was eight-tenths, and from that I formed an approximate idea of how much I could get up, but that was nothing definite at all.

"Q. Did you indicate approximately what that would be?

"A. Well, I think I said something between 45 and 50 feet—perhaps 60; I don't know. We were not definite at all. I saw it was possible to get up on our maximum grade, because the low line grade was much lighter.

"The tunnel is about 3.2 miles from the dam site. The elevation of the line at the tunnel is 661, and the elevation at the dam site is 781. That isn't right at the dam site but 781 is the profile grade at the level where we run levels parallel with the water that would be restrained by the dam. I indicated approximately what elevation we could make at the dam site, at that conference. I knew that we could get up some number of feet and Laughlin said anything we could get up there would be very desirable. I don't remember exactly the height I thought we could make. It was 45 or 50 feet, perhaps 60. I don't remember, but the whole thing hinged on starting up on a maximum grade and getting as high as we could. That is what my instructions were to do.

"Q. Did Mr. Laughlin express satisfaction or dissatisfaction with the approximate height which you indicated?

"A. Well, as I said, at this conference he said that anything that we could get up there would be very desirable and agreeable to them; whatever we could do would be appreciated.

Testimony of Boschke. (Continued.)

"Q. Mr. Laughlin has testified in his deposition that at that conference Mr. O'Brien instructed you to raise that line sufficiently high so as not to interfere with the power development at the Sherar or Interior Development site, irrespective of cost. What is your recollection with reference to that?

"A. No, I did not get any instructions at that conference to do anything more than to investigate it."

(See Transcript, pp. 328-329.)

On cross-examination, Mr. Boschke testified:

"Q. You made an affidavit once in this case, didn't you?

"A. I think so, yes.

"Q. I will read from it; you can follow it if you wish: 'Said B. F. Laughlin was negotiating at said time with the Deschutes Railroad Company, to induce the said Deschutes Railroad Company to raise its line of railway where same should run to such an extent as to permit the construction of a dam at said dam site, 60 feet in height above low water flow of said Deschutes River.' Now, your recollection is now, you didn't say anything like that?

"A. I said we would raise it, as I said before—we could probably get up from 45 to 60 feet.

"Q. That was not what he was asking you to do then?

"A. He said he would be very glad of any height we could get up.

"Q. Now, in your affidavit you say, 'Said negotiations were had, and said request was made of said Laughlin.' You don't remember that he made that request 'must go up 60 feet high'?

"A. Well, it was understood that we could go from 45 to 50 or 60 feet; something of that kind. I never saw him afterwards.

"Q. Now, did you agree at that time that you would go up that high?

"A. No, sir, we did not. We agreed to see what we

Testimony of Boschke. (Continued.)

could go up; we would go up whatever our maximum grade would allow us to go up.

"Q. Did you ever have any interview with Mr. Laughlin except that one time?

"A. I never saw him that I remember of.

"Q. What did he say about the height to which the road should be raised, which would be satisfactory to him?

"A. He said whatever we could get up there would be satisfactory to him.

"Q. Now, in this affidavit you say that he said, 'That if the height of the line of the Deschutes Railroad Company were raised to the height of 60 feet, or raised to a height to permit of a 60-foot dam at this dam site, it would be satisfactory?"

"A. Well, I think he did say that after I said we could probably get up a certain height. He may have said 60 feet, or 55 or 60 feet, whatever we could get up on the maximum grade would be very satisfactory to him.

"Q. In your affidavit you said he said that if you would go up 60 feet, to build a 60-foot dam, it would be satisfactory, didn't you?

"A. Yes, I think very likely it was a fact.

"Q. So he really did say to you, if you would go up to such an elevation as to permit the building of a 60-foot dam at this dam site, it would be satisfactory to him?'

"A. Well, possibly he did, but I couldn't tell him at that day that Mr. Laughlin was making this arrangement at all.

"Q. That is what he said would be satisfactory?

"A. I expect he did.

"Q. He didn't say anything else was satisfactory?

"A. Yes, he did. He said any height would be satisfactory that we could get up to.

"Q. In your affidavit, you didn't say any height, did you?

"A. No, I didn't say that possibly, in there, but that was the fact, just the same."

(See Transcript, pp. 334-336.)

The testimony of the Railroad officers is in conflict with the testimony of Laughlin, who said: Testimony of Laughlin.

"In that conversation Mr. O'Brien said he wanted me to get all the interested people to agree upon a price for a right of way on the river there, and at the same time guaranteed to protect the Sherar property to the fullest extent that it was possible. He called Mr. Boschke in and asked him about how they had run their grade on the river, and he said they had run it right along—a few feet from water. He told Mr. Boschke he would have to go back and re-run the line and save every foot of power for the Sherar property that could be saved. That they had examined the property with their engineer and that they might have to buy it before they got through but to save every foot it was possible to save. Mr. Boschke remonstrated, said he would have to back twelve miles. Well, he told him it didn't make any difference how far he had to go back, he must do it.

"Q. What, if anything, was said in that conversation about compensation for the right of way?

"A. They said they would have to pay the damages and if they had destroyed the property, they would have to buy the property.

"Q. Did Mr. O'Brien say in that interview anything about knowing the value of the property for water power purposes?

"A. He said they had examined it for that purpose.

"Q. What did you say about what should be paid for the property, for right of way over the property for a railroad?

"A. I said I should expect pay according to the amount of damages, whatever the height that the road run. There was no amount stated."

(See Transcript, pp. 518-519.)

"Along, I think, in the fall of 1909, Mr. Morrow of the

Testimony of Laughlin. (Continued.)

Deschutes Railroad Company called me up several times and wanted to get the right of way. I told him that as the matter stood at that time there was a buying privilege out on it and that I could not give him a right of way, and the Sherar's could not give him a right of way, but I thought the Eastern Oregon Land Company would be in shape in a short time so they could deal directly with them upon the title for the right of way. There was no proposition made to me to buy the right of way over the property, nor any sum set or fixed or offered to me for the right of way.

"Q. Was the amount to be paid ever discussed except in this interview with Mr. O'Brien?

"A. None. It wasn't discussed then.

"Q. Mr. Laughlin, what, if anything, did you do so far as giving the Deschutes Railroad Company the right to go and build a railroad over that property?

"A. I didn't give them any.

"Q. Was any application ever made to you for right to go on that property and build a railroad over it?

"A. No; no application more than Mr. Morrow asked me if we could settle the right of way on there and I told him we could not, wasn't in a position to do so.

"I did not know personally whether they re-located the line, as I was not over the ground afterwards. I know it in other ways but I never talked with Mr. O'Brien about it after the time I speak of when he told me he would have it changed. In talking with Mr. Morrow nothing was said about the location having been changed.

"Q. What did you know about their constructing the railroad over that property?

"A. All I know about it is from hearsay. I don't know anything myself, because I have never been on the ground."

(See Transcript, pp. 520-521.)

Testimony of Laughlin. (Continued.)

"I think I had only one direct conversation with Mr. Morrow afterwards. I had one or two over the 'phone. In the conversation I had with Mr. Morrow, the one in November I think, I told him to wait until it was settled by the Eastern Oregon Land Company whether they took it. If they didn't take it, then Mr. Grimes and the Sherar heirs and myself would get together and talk with him, but up until that was done I was not at liberty. Nothing was said about what we would charge for a right of way nor as to what the railroad company would pay. Nothing was said in that conversation in regard to Mr. Morrow having had any interviews with Mr. Martin about the matter. I don't think he had had any interview with Mr. Martin at that time. No mention was made of any conversation which he said he had had with Mr. Martin."

(See Transcript, p. 523.)

While the testimony of Mr. Laughlin pictures a situation more in accordance with the habits and customs of our people than that detailed by Mr. O'Brien and Mr. Boschke, and while the testimony of Mr. Laughlin is not in conflict with any affidavits made some years before and much closer in point of time to the transactions which took place, it is unnecessary to seek to unravel this conflict and ascertain the truth.

The testimony does not show any agreement binding on the plaintiff.

The agreement between Laughlin and the Railroad, whatever its terms may be, was an oral agreement affecting title to real property, and was invalid under the Statute of Frauds.

It is not pretended that this agreement was executed, in whole or in part, at the time Laughlin sold to the

The testimony does not show any agreement binding on the plaintiff. (Continued.)

plaintiff. It is not pretended that plaintiff had any actual or constructive notice or knowledge of the agreement, and it is admitted that the defendant took no step in execution of the agreement till after it knew that plaintiff had acquired Laughlin's interest. Moreover, as the defendant asserts that the work done was done in execution of a subsequent agreement between the Land Company and the defendant, the testimony is as a whole irrelevant.

NEGOTIATIONS BETWEEN SHERAR'S EXECUTORS AND THE RAILROAD COMPANY.

Though the order denying the preliminary injunction is not part of this record, and the affidavits used by the defendant in resisting the motion are not set forth in full, it is quite apparent that the defendant attempted to justify its entry upon and occupation of the property by an agreement entered into between the Sherar executors and the railroad, by which leave to enter upon the property and construct the road was given by Sherar's executors on the condition that the road was so located as to permit the maintenance of a dam 60 feet in height. In support of this contention, Mr. Morrow, the right-of-way agent of the road, testified as follows:

Testimony of Morrow.

"Q. You made an affidavit in this case, did you not?

"A. Yes, I did.

"Q. And in the affidavit which you made in this case, you referred to this conversation between yourself, Mr. O'Brien, and Mr. Laughlin, did you not?

"A. Well, I don't recall, Mr. Minor. If you will read

the affidavit, the affidavit speaks for itself. It is a long time since that affidavit was made.

"Q. Well, I will read this affidavit:

"That in the presence of J. P. O'Brien, G. W. Boschke, B. F. McLaughlin and myself, the said B. F. Laughlin, representing himself as being in possession of an option to purchase the Sherar Estate property, when a general discussion was had with reference to the construction of a line of railroad over the same, said Laughlin urged that the road should be built at as high an elevation as possible; in fact, stating to the remaining three, who were representing the railroad interests, that if they would go as high with the grade as they could, they would be satisfied; when the chief engineer, by reference to his profile and maps, stated that it was possible to reach a height so that a dam sixty feet in height could be constructed, and this was agreed upon the part of Mr. Laughlin to be sufficient.

"Q. Do you remember making an affidavit to that effect?

"A. If those are the words of the affidavit, and I have no reason to doubt them, I made it.

"Q. Then in that conversation it was agreed that the elevation should be sufficient to allow of building a sixty-foot dam?

"A. Well, I don't think so, Mr. Minor. Now, I will tell you about that sixty-foot dam. I am satisfied that Mr. Boschke said that he could reach an elevation—if not positively—I think positively of 60 feet. That is the way I have it in my mind. And the dam site or the dam—I think that I reached that conclusion subsequently, and after the survey was made, and had an understanding that it was possible to construct a dam at the height of 60 feet; but at the conference that I am testifying concerning, I don't believe that that was true. If my affidavit says so, I believe it is erroneous to that extent.

"Q. You may read your affidavit and see whether it doesn't say so.

"A. Oh, I don't question your word for it, Mr. Minor. I don't question your reading of the affidavit.

Testimony of Morrow. (Continued.)

"Q. Then your affidavit, wherein you state that Laughlin agreed that an elevation which would admit of the building of a 60-foot dam was sufficient, is erroneous in that particular, you think?

"A. Well, Mr. Laughlin was satisfied with the discussion had at that time, and, as I say, I am myself satisfied that Mr. Boschke said that he could reach an elevation of 60 feet; and Mr. Laughlin was satisfied with whatever the discussion was. I know that perfectly.

"Q. Well, do you remember whether the question of the height of the dam was discussed or not?

"A. Well, I don't. My recollection of it is just as I have stated it to you.

"Q. This affidavit gave your recollection at the time it was made, didn't it?

"A. Why, yes. Yes, unless—Well, I am sorry that is there, of course, but the phraseology I must not have noticed specially at the time, Mr. Minor.

"Q. This affidavit purports to have been made on the 30th day of April, 1910.

"A. Yes.

"Q. That is about the time it was made, isn't it?

"A. Oh, yes, whenever it is dated there, it was made at that time.

"Q. Well, now, do you think that your recollection now is better than your recollection was at that time?

"A. No, I do not think that it is.

"Q. So you think your recollection at that time was more apt to be right than your recollection now?

"A. Not necessarily more apt to, but equally as reliable at that time as it is now.

"In the interview between me and Mr. Grimes, when we went to Mr. Huntington's office, he reiterated the statement to Mr. Huntington which he had made to me, and it was understood then that we could go ahead and construct our line. I think that I negotiated with these people upon the theory that the elevation to which the road should be built was sufficient to admit of the construction of a 60-foot dam.

Testimony of Morrow. (Continued.)

"Q. Now, Mr. Morrow, in this affidavit you say: 'We then agreed upon a consideration of $1000 to be paid for the right of way through the said Sherar Estate property; and the further agreement and understanding was had that the line of railroad should be built at such a height as to permit of the construction of a sixty-foot dam.'

"A. I think that is right.

"Q. You think that is right?

"A. I think that is right.

"Q. Mr. Grimes insisted and you agreed that the railroad should be built at such an elevation as to admit of the construction of a 60-foot dam?

"A. No, Mr. Grimes never insisted upon any particular height at all; nor did Mr. Huntington. It was simply my statement to them that we could do that, to which they offered no objection, but were satisfied with it.

"Q. But it was agreed that the railroad should be built at an elevation to admit of the building of a 60-foot dam?

"A. I negotiated with them, as I believe, with that understanding.

"In connection with my conversation with Mr. Laughlin, he always said he would be glad to donate the right of way, there is no question about that. I don't recall that he said that in his conversation in July. I think my conversation with Mr. Welch was subsequent to August. I submitted to him the maps and profiles and I presume I said to him—I have no doubt I did say to him, 'I notice that you have an interest in some property up here, and I am negotiating for the rights of way over these lands.' I wanted to know what position he would take in connection with the right of way, and he very agreeably said he would be glad to give us the right of way—no compensation for that; the only thing is that he wanted protection for his power plant. I think I told him that we could build a line there 60 feet, or build a line there that would permit of a 60-foot dam.

"Q. So that, in your conversation with Mr. Welch, you represented that the railroad would be put at such an elevation as to admit of the building of a 60-foot dam?

Testimony of Morrow. (Continued.)

"A. I think I did, yes.

"Q. And that is what he said he would be satisfied with?

"A. Yes, he must have said he would be satisfied with it, because he said he was satisfied that we go ahead and commence the construction of our line.

"Q. But the representation you made was that the line would be built at an elevation to admit of the building of a 60-foot dam?

"A. Yes, I think that is right. *In all our negotiations with any parties interested in that property, the principal point of contention was the height of the dam; the power sites were always interested, in avoiding the possibility of interfering with the construction of the dam, and in all these negotiations, the height was always at a 60-foot level above the low water flow of the Deschutes River according to my understanding of it, and I think that is right.*

"Q. Now, I call your attention to your affidavit, in which I find this language: 'That in the negotiations with each and all, the principal point of contention was the height of a dam, and this height was always at a 60-foot level above the low water flow of the Deschutes River.'

"A. Yes, sir.

"Q. That is correct, is it?

"A. I admit that this is—as I have said, I think that was the basis of my negotiations."

(See Transcript, pp. 358-364.)

This is the very best case that can be made out for the Railroad Company so far as the Sherar lands are concerned. Morrow was the only representative of the Railroad that ever had any transactions with the Sherar executors. The account of these negotiations, given by Mr. Grimes, one of the executors, and Mr. Huntington, counsel for the executors, differs radi-

cally from the account of Mr. Morrow. Mr. Grimes testified as follows: Testimony of Grimes.

"Q. Mr. Morrow states, Mr. Grimes, that in the said negotiations for the purchase of the right of way you stated to him that the principal value of the lands lay in their availability for a power site; that the construction of a line of railroad would enable them to develop this power site, whereas without a railroad it would be practically impossible, and therefore as to the consideration for the right of way, so far as you were concerned you would be glad to donate the right of way in order to secure the construction of a line of railroad, but that in view of the fact that there were many heirs to the estate it would be impossible to satisfy them without a consideration, and that you and he then agreed upon a consideration of one thousand dollars to be paid for the right of way through the Sherar Estate property, and that you further agreed that the line of railroad should be built at such a height as to permit of the construction of a sixty-foot dam. Now what do you remember about anything occurring from which Mr. Morrow made this statement?

"A. I have no recollections of any such talk as that outside of Mr. Huntington's office, which I have just stated there before.

"Q. Was anything said between you and Mr. Morrow when you and he were together alone, outside of Mr. Huntington's office?

"A. In regard to this matter?

"Q. Yes.

"A. I have no recollection of anything being said.

"Q. No conversation of that kind occurred between you two?

"A. No, sir."

(See Transcript, pp. 541-542.)

Testimony of Grimes. (Continued.)

"Q. You didn't have any negotiations at all in regard to a dam site there with the Railroad Company?

"A. Not any more than they were notified, that is in our talk with Mr. Morrow, that if we gave them a right of way through there they would have to keep high enough to protect the dam site.

"Q. How high a dam site would they have to protect there?

"A. I had nothing to do about the figures that the dam site was to be, the height they were to keep. It was supposed to be from sixty to sixty-five feet, my understanding was.

"Q. Wasn't it fifty-five feet you were talking about?

"A. No sir, I don't think so. I never heard of any fifty-five feet.

"Q. What did Mr. Morrow say about keeping up there to protect the dam site?

"A. I have no recollection of his making any reply whatever.

"Q. Who were you representing when you were talking about elevating the road there to go over the dam site?

"A. I understand there was a filing on the dam site there, and of course, the dam site had to be protected.

"I do not know whose filing was on it. I had no filing there and the Sherar Estate had none to my knowledge. I have no recollection about any other talk for right of way with the Deschutes Railroad Company outside of this one with Mr. Morrow."

(See Transcript, pp. 547-548.)

Mr. Huntington's account of the transaction is embraced in a letter written by him to Morrow at the time the transaction took place, for the very purpose of embodying the terms of the transaction in writing. The letter is as follows:

Huntington's letter and testimony.

"August 25th, 1909.

"Mr. J. W. Morrow, c/o O. R. & N. Co., Portland, Oregon.

"Dear Sir:

"Confirming our telephone conversation of this afternoon the executors of the will of J. H. Sherar, deceased, and who also are attorneys in fact for several of the heirs are willing that the Deschutes Railroad Company shall proceed with the construction of its road across the Sherar lands in the Deschutes Canyon, provided the road is constructed sufficiently above the river *as* that it will not interfere with the use of the property for hydraulic purposes, and the persons who have agreed to purchase the property consent. The executors understand that if the persons who have agreed to purchase do not take the property that your company will pay One thousand dollars for the right of way. If the sale is consummated, as we assume it will be, then you are to settle with the purchasers for the right of way.

"Yours very truly,
HUNTINGTON & WILSON."

(See Transcript, p. 175.)

Concerning the writing of this letter, Huntington testified as follows:

"The conversation which led to the writing of that letter, as well as I can remember, was that Mr. Morrow called me to the phone and said that their contractors were very anxious to proceed with the construction work across the Sherar land and wanted to know if I, representing the heirs, would consent to their proceeding. I told him that we were not in position to give our consent; that we had contracted the land to the Eastern Oregon Land Company; that insofar as the heirs themselves were concerned, if the Eastern Oregon Land Company didn't take the land under the option, I thought the heirs would give their consent. Something was said about the price, and I think the price

Huntington's letter and testimony. (Continued.)

had been talked over before between Mr. Morrow and Mr. Grimes. Anyway, I had been advised that the price for the right of way, if the Eastern Oregon Land Company didn't take the land under the option, would be $1000, the company to so construct its road as not to interfere with the development of the water power at that point, and so as not to interfere with the toll roads which were owned by the heirs at that time; there were two toll roads which they crossed. But I told him that he would have to obtain the assent of the Eastern Oregon Land Company, and thereupon wrote him this letter in confirmation of the telephone conversation, which is as follows:"

(See Transcript, p. 174.)

Summary.

It is apparent that in view of this testimony, and there is no other testimony in the record relating to any transaction between the Railroad and Sherar's executors, the Railroad Company has not sustained its case. If the version of Morrow be accepted, the Railroad Company must accept and take its right of way subject to the right of the Land Company to maintain a dam 60 feet in height. If the testimony of the executor and Huntington is accepted, the right of the Railroad Company to maintain its tracks is subject to the condition that the same be constructed so as not to interfere with the development of water power. Whatever view be taken, the Railroad Company has no right to obstruct the construction of a 60-foot dam.

Unangst's Appeal, 55 Pa. St., 128.

THE RIGHT OF THE PLAINTIFF TO OBJECT TO THE LOCATION OF THE ROAD AS THE SAME IS NOW CONSTRUCTED WAS NOT WAIVED BY ANY CONTRACT BETWEEN THE PLAINTIFF AND THE RAILROAD COMPANY.

At the time the transactions between the Railroad Company and the executors of Sherar took place, the Railroad was informed that the Eastern Oregon Land Company was the owner and holder of the option on the Sherar lands. This was on August 25, 1909. No writings ever passed between the plaintiff and the Railroad Company, and the claim that plaintiff assented to the construction of the road over the land rests in the testimony of Morrow. The letter of Huntington to Morrow declared:

> *"If the sale is consummated, as we assume it will be, then you are to settle with the purchasers for the right of way."*

(See Transcript, p. 175.)

Morrow met Martin about the time this letter was written. The meeting was not prearranged; merely a chance meeting in a railroad train. Concerning the conversation which then took place, Morrow testified as follows:

Morrow's testimony and letter.

> "I think I broached this subject to Mr. Martin, and it developed that he was the prospective purchaser; and I outlined to him the agreement that I had reached with the Sherar estate representatives, and that agreement was entirely satisfactory to him. He said that we could go on

Morrow's testimony and letter. (Continued.)

and build the line, and as a matter of fact, when the thousand dollar consideration was mentioned, Mr. Martin wasn't at all interested in that feature of it. I said to him, 'I have agreed to pay the Sherar estate a thousand dollars, and I will do the same thing by you.'

"To that Mr. Martin simply said that it was satisfactory. He was perfectly satisfied to have us go on and construct our line, and he was willing to carry out the agreement that I had had with the Sherar estate people. After the conference with Mr. Martin, I notified the Chief Engineer, Mr. Boschke. I also notified Mr. Huntington that I had seen Mr. Martin, and that he had expressed his willingness."

(See Transcript, pp. 349-350.)

On August 27th, Morrow wrote Huntington, acknowledging the receipt of the letter of August 25th, saying:

"Huntington & Wilson,
Attorneys at Law,
The Dalles, Oregon.

"Gentlemen:

"This will acknowledge receipt of your letter under date of August 25th confirming our conference and understanding over the contention with reference to the construction of our line through the Sherar's estate property, for which I thank you very much. And at the same time I am pleased to advise that I talked this matter over with Mr. Martin of the Eastern Oregon Land Company, who has expressed a willingness to have us go upon the land to construct our line.

"Very truly yours."

(See Transcript, p. 353.)

On cross-examination, Morrow said:

Morrow's testimony and letter. (Continued.)

"I first met Mr. Martin very early in the activities on the Deschutes line. I had negotiations with Mr. Martin for the line down at the mouth of the stream. It is difficult to fix the dates because our preliminaries range from 1906 until we completed the line. The negotiations I had with Mr. Martin were entirely in regard to crossing the lands of the Eastern Oregon Land Company down toward the mouth of the Deschutes River and had nothing to do with the Sherar property. The first talk about the Sherar property was on *August 24th, 1909,* on a trip from Salem to Portland on the train. This was the first and only time I ever opened negotiations with him in regard to the right of way over the Sherar property. The conversation opened up in a general way and during the progress of it I perhaps asked—I wouldn't be surprised but what I asked Mr. Martin directly if he were not the proposed purchaser of the Sherar Estate property. Anyway, learning that he was, I reiterated to him the statement of agreement that I had with the Sherar Estate representatives, to which he consented, and seemed perfectly satisfied with. There was some conversation concerning the cash consideration, and that was an entirely negligible quantity with Mr. Martin. I am inclined to think that he rather objected to taking any money. I said to him that I had agreed with the Sherar Estate to pay that sum; there was no reason why I should not pay it to him, and that I would pay it to him. Anyway, he was perfectly satisfied and said we might go along in the construction of our line. I told him that I had met Mr. Huntington and Mr. Grimes and had agreed to give One Thousand Dollars for the right of way and had their permission to go on with the construction of the line—enter upon the lands and construct the line. While I do not recall it, I must have told him about what had occurred between me and Mr. Grimes about the elevation at which the railroad was to be built. I don't recall positively the conversation that I might have had with him con-

Morrow's testimony and letter. (Continued.)

cerning the height of the dam, and I really don't recall that it was raised at all; but in all probability, when I stated to him the understanding I had with the Sherar people, I also included the fact that we were building at an elevation to admit of the construction of this dam.

"Q. *60-foot dam?*

"A. *Yes, I possibly did.*

"I have an idea that I told Mr. Martin that also. The only writing I ever had with reference to the right of way over the Sherar property, was the letter from Mr. Huntington which has been placed in evidence and which I replied to. I do not recall that I had, and I don't believe I had any correspondence in writing of any kind, or any negotiations in writing of any kind with either Mr. Laughlin or Mr. Martin, or the Eastern Oregon Land Company, or Welch, or Anderson, or the Interior Development Company, or Grimes, or any party representing the Sherar interests."

(See Transcript, pp. 364-366.)

Martin's testimony.

Martin's account of the conversation differs from that of Morrow. In fact, his testimony is in direct conflict with that above quoted. Martin's testimony was as follows:

"The defendant railroad company never made any attempt prior to the bringing of this suit to agree with me or my company for the obtaining of a right of way over this land. No one on behalf of the railroad company ever undertook to negotiate with me for a right of way over the lands that I know of."

(See Transcript, p. 185.)

"Q. Now, do you remember a conversation on the Oregon Electric Line on the 24th day of August, 1909, between yourself and Mr. Morrow?

Martin's testimony. (Continued.)

"A. I do.

"Q. What if anything was said at that time about this project?

"A. Well, I had been down to Salem to see Mr. McCormack about purchasing the Interior Development Company's interest in this property. I met Mr. Morrow on the car by chance, and I don't know how the conversation began unless it was in connection with the Moody site, and I remember that Mr. Morrow said that he thought the Deschutes River was an exceptional opportunity for the development of power and that we had a valuable property there. That if he had gotten the opportunity for a five-minute conversation with Mr. Harriman, he would have bought for the railroad company the Sherar site, which he thought was valuable property. I told him I was very glad to hear he thought so well of it, as we had just concluded the purchase of the property, and he congratulated me on it and said 'I hope that we will have as agreeable a time fixing the right of way over the Sherar site as we had at the mouth of the river.' I said 'I hope we will.' The conversation languished as far as that was concerned.

"Q. Didn't Mr. Morrow say to you at that time he had been to see the Sherar heirs and the Sherar representatives to purchase a right of way over there, and had agreed with them to pay them a thousand dollars in case you didn't take the property, and would be glad to pay you—

"A. I don't recollect it.

"Q. (continuing) and would be glad to pay you that sum of money if it would be satisfactory to you?

"A. He never said that to me."

(See Transcript, pp. 200-201.)

"Q. * * * You testify, Mr. Martin, that you at no time agreed to take a thousand dollars for this right of way over the Sherar property in case you acquired it?

Martin's testimony. (Continued.)

"A. Absolutely; a thousand dollars was never mentioned to me in connection with this property; it would have been a joke."

(See Transcript, p. 202.)

"I heard Mr. Morrow's testimony in regard to the meeting with me on the train between Salem and Portland. I told Mr. Morrow, as well as I can recall, that we had concluded the purchase of the Sherar property.

"MR. WILSON—At the time of this conversation on the Salem car?

"A. Yes. That we were the purchasers. I don't remember the exact words.

"Q. Now, I would like for you to tell the court what Mr. Morrow said to you, if anything, about his agreement wtih the Sherar Estate representatives.

"A. To the best of my recollection, Mr. Morrow didn't tell me of any arrangement that he had made with the executors of the Sherar's Estate.

"Q. Any of the representatives of the estate at all?

"A. Or any of the representatives.

"Q. Did he say anything to you about having any talk with Mr. Grimes or Mr. Huntington in regard to that matter?

"A. He did not, as far as I can recollect.

"Q. He states in his testimony that he outlined this agreement to you, and that you said that the agreement was entirely satisfactory to you. Now, what is the fact in that regard?

"A. Mr. Morrow, to the best of my recollection, did not refer to any arrangement or agreement that he had with the Sherar Estate, or their representatives, and did not outline to me any agreement that he had with them.

"Q. Did you say to him that this agreement was satisfactory to you?

"A. I did not.

"Q. As a matter of fact, Mr. Martin, if he had told you

Martin's testimony. (Continued.)

what he testifies on the stand he did tell you that occurred between himself and the representatives of the Sherar Estate, would that have been satisfactory to you?

"A. It would not.

"Q. Now, do you recollect whether Mr. Morrow ever said anything to you about agreeing to pay $1000?

"A. I never heard of this agreement, as having been passed up to me and being agreed to by me, until the time that the injunction was applied for and I was asked to make an affidavit in response to an affidavit that was made by Mr. Morrow."

(See Transcript, pp. 499-500.)

Summary.

Here, again, the testimony is conflicting, but in view of the existing conditions it is unnecessary to determine whether the recollection of Mr. Martin or that of Mr. Morrow should be accepted.

Morrow declares that he informed Martin of the arrangement made with the Sherar Estate, to which Martin assented. This arrangement, as stated, August 25, 1909, in the letter of Huntington, was conditioned on the provision that the road should be located so as not to interfere with the development of water power, and provided that if the land were purchased by the Land Company, the Railroad Company would settle with the Land Company for the right of way (See Transcript, p. 175). The letter of August 27th, in which Morrow acknowledges receipt of Huntington's letter, accepts this as an accurate statement of the agreement. Indeed, in this very letter, which substantially approves the agreement as stated

Summary. (Continued.)

by Huntington, Morrow states that he has seen Martin, who expressed a willingness that the Railroad go upon the land. According to Morrow's recollection, he believes he also informed Martin of the fact that the road would be constructed at an elevation sufficient to admit of the construction of a 60-foot dam (See Transcript, p. 365). Morrow said:

> "In all our negotiations with any parties interested in that property, the principal point of contention was the height of the dam; the power sites were always interested, in avoiding the possibility of interfering with the construction of the dam, and in all these negotiations, the height was always at a 60-foot level above the low water flow of the Deschutes River according to my understanding of it, and I think that is right."

(See Transcript, p. 363.)

But it is admitted that the road as built does not conform to the agreement with the Sherar executors, either as stated in the Huntington letter or in the testimony of Morrow. Under any circumstances, Martin did not acquiesce in the construction of the road in a manner which would prevent the maintenance of a 60-foot dam. Assuming that plaintiff entered into this agreement, it did not consent to the location of the road where its grade has been built.

THERE IS NO WARRANT FOR THE CLAIM THAT THE LAND COMPANY IS ESTOPPED FROM OBJECTING TO THE LOCATION OF THE ROAD ON THE LINE ON WHICH THE SAME IS CONSTRUCTED.

The basis of this claim of estoppel.

After Huntington received Morrow's letter informing him that Martin had assented to the Railroad entering on the land to construct its road, Huntington promptly wrote to Balfour, Guthrie & Company, the local agents of the Eastern Oregon Land Company, informed them of Morrow's statement and suggested that he be disabused of the impression existing in his mind if it were in fact erroneous. This letter was never forwarded to the Land Company, and though Balfour, Guthrie & Company, agents of the Land Company, knew of the claim of the Railroad early in September, they paid no attention to it.

If Morrow put forth in good faith the claim asserted in the letter to Huntington, and the Land Company was apprised thereof, it is apparent that the Land Company should have corrected the impression under which he labored. Balfour, Guthrie & Company seem to have regarded the claim as preposterous and paid no attention to it. They neither notified the Land Company of the assertion of the claim or the Railroad Company of Morrow's mistake (Tr., fols. 502-3).

The learned Judge of the District Court seems to have been of the opinion that no agreement was ever made between Martin and Morrow. Indeed, in

The basis of this claim of estoppel. (Continued.)

neither the first nor the second opinion is the existence of such an agreement recognized. The Judge was of the opinion that under these circumstances the failure of the Land Company to inform the Railroad Company that no agreement existed, estopped the Land Company from denying the existence of the agreement after the Railroad Company acted.

(See Transcript, p. 117.)

It is unnecessary to determine whether or not the failure of the Land Company to notify the Railroad of the fact that it did not acquiesce in the agreement between the Sherar Executors and Morrow could have been a basis on which an estoppel could arise.

The limit of the estoppel asserted.

Under no circumstances would such estoppel go further than make binding upon the Land Company the agreement under which the Railroad claimed to act.

If an estoppel arose against the Land Company it merely prevented that company from objecting to the execution of the agreement with the Sherar Executors which formed the basic warrant for the entry by the Railroad upon the land then in the possession of the Sherars.

The failure of the Land Company to notify the Railroad Company that it objected to the entry of the Railroad Company upon the property could not be considered as inducing or justifying the Railroad Company in doing any act or thing not authorized

The limit of the estoppel asserted. (Continued.)

by the agreement between the Sherar Executors and the Railroad.

But the Railroad Company did not construct its road in accordance with this agreement. Whether the Sherar contract be regarded as embodied in full in the Huntington letter, or whether the agreement of the parties specified that the road should be constructed so as to permit the erection of a dam 60 feet high as testified to by Morrow, is immaterial. The Railroad Company has not complied with the contract under either view.

Certain admitted facts.

If it be conceded that the provisions of the contract concerning the entry of the Railroad Company upon the Sherar lands, and the construction of the road, are binding upon the plaintiff, either by virtue of an estoppel or by reason of the plaintiff giving express sanction to the agreement as Morrow declared, it is the admitted fact that the road as constructed does interfere with the use of the property for hydraulic purposes, while the contract declared,

> "* * * that the Deschutes Railroad Company shall proceed with the construction of its road across the Sherar lands in the Deschutes Canyon, provided the road is constructed sufficiently above the river *as* that it will not interfere with the use of the property for hydraulic purposes, and the persons who have agreed to purchase the property consent."

(See Transcript, p. 175.)

Certain admitted facts. (Continued.)

According to the testimony of Morrow, it was agreed that the point at which the road should be constructed so as not to interfere with the power development, was a point sufficiently high to permit the construction and maintenance of a 60-foot dam, Morrow saying:

> "In all our negotiations with any parties interested in that property, the principal point of contention was the height of the dam; the power sites were always interested, in avoiding the possibility of interfering with the construction of the dam, *and in all these negotiations the height was always at a 60-foot level above the low water flow of the Deschutes River according to my understanding of it, and I think that is right.*"

(See Transcript, p. 363.)

So, according to the testimony of Morrow, the defendant was not and could not at any time have been led to believe either by reason of contract or estoppel, that the plaintiff or any other person consented to the construction of the road unless the location was such as to permit the maintenance of a dam 60 feet high. But it is admitted that the maintenance of a dam 60 feet high will, in times of high water, result in damage to the road as located, and the decree in this case enjoins plaintiff from maintaining a dam which would flood or damage defendant's railroad.

This decree is not justified by any contract or agreement between any parties, and the result is to take the property of plaintiff without compensation, for none is awarded.

The lower court was, however, of the opinion that the plaintiff was estopped from asserting that the road was not located in accordance with the contract. Concerning this, the court, in its first opinion, said:

Opinion of Judge Bean.

> "It thus appears that notwithstanding complainant had knowledge of defendant's possession, the claims under which it was proceeding, the actual location of its line and the work being done thereon, it allowed the work to proceed without objection until after defendant had expended large sums of money relying on its agreement or supposed agreement with the interested parties, including the complainant.
>
> "I am therefore inclined to the opinion that under such circumstances the complainant cannot be heard to say that the road was located and constructed at the place where it was actually built without its consent."

(See Transcript, p. 119.)

This is the crux of the opinion, and the statements of fact on which it is based are without any support whatever in the evidence. On the contrary, the evidence shows that no estoppel of any kind arose.

The evidence shows no estoppel.

In September or October, 1909, the Land Company ascertained that the Railroad Company intended to build across the land. Whistler, Chief Engineer of the Land Company, called on Boschke, Chief Engineer of the Railroad Company, to ascertain the location of the road. The following testimony shows what took place at that interview. On his direct examination, Boschke said:

Testimony of Boschke.

> "I saw more or less of Mr. Whistler along the river there. He called on my office for information as to the

Testimony of Boschke. (Continued.)

height of the line, etc. He, as I understood it, was representing Mr. Martin's interests. In calling at my office, he wanted maps and profiles of the railroad located line. I furnished these to him in October, I think it was October, the latter part of October, 1909. The profile referred to by Mr. Whistler in his letter of October 6, 1909, to Balfour, Guthrie & Company, as having been furnished by my office, is a profile of the line for several miles on each side of the dam, and showed the location of the line as indicated on Plaintiff's Exhibit 31. I offered to give Mr. Whistler all the information I had, as indicated in his letter to Balfour, Guthrie & Company. With reference to the statement in Mr. Whistler's letter to Balfour, Guthrie, that the profile did not show the elevation above water surface of river, I should think it would be a very proper thing for him to go there. He had where our line was. It was staked out on the ground, and he could find the river there.

"Q. When you said you thought it was about 70 feet, did you purport to give him any accurate information?

"A. No, sir.

"Q. Did you advise him that you had any such information?

"A. No, I don't recall that, because we didn't take—in running our survey, we didn't take the bed of the river, you know. We had a high water and low water on the low line, and it could have been arrived at. He had ample information. By going on the ground, he could very readily determine.

"Q. Did you attempt to deceive him?

"A. None whatever, no sir."

(See Transcript, pp. 330-331.)

"Q. Did Mr. Whistler ever make any objection to you that your line wasn't high enough for the purposes for which his client wanted to use the property there?

"A. He spoke of the upper end, the way our grade lay, where the water came down, coming down the natural

grade of the river, would reach the water backed up from the dam; it would probably flood our grade in there. I said to him, that part of it, we would readily change that when the time came; when he had a dam three, but I did not believe in spending any money to change that at this time." *Testimony of Boschke. (Continued.)*

(See Transcript, p. 333.)

On cross-examination, he said:

"When I gave Mr. Whistler the profile, which seemingly was on the 29th of October, I may have discussed the height at which the grade was being constructed, and I may have informed Mr. Whistler that the road was being constructed at a height sufficient to permit the construction of a dam at the dam site of the Interior Development Company, 60 feet in height. I must have done it if it is in that affidavit; I probably did.

"Q. In your affidavit you say this: 'On October 29, 1909, I delivered to Mr. John T. Whistler maps and profile of the line of the said Deschutes Railroad Company as amended, to comply with the undertaking and agreement had with said B. F. Laughlin, and showing the elevation at which said line was then being constructed, and work on it had been prosecuted for approximately two mnoths, and discussed with said John T. Whistler the height at which said grade was being constructed, and informed the said Whistler that the same was of a height sufficient to permit the construction of a dam at the site known as the Interior Development dam site above referred to, of 60 feet in height."

(See Transcript, pp. 339-340.)

Testimony of Boschke.

It is this testimony of Boschke on which the claim of estoppel rests, and this testimony must be viewed

Testimony of Boschke. (Continued.)

in connection with the following testimony of that witness:

"Q. You made an affidavit once in this case, didn't you?

"A. I think so, yes.

"Q. I will read from it; you can follow it if you wish: 'Said B. F. Laughlin was negotiating at said time with the Deschutes Railroad Company, to induce the said Deschutes Railroad Company to raise its line of railway where same should run to such an extent as to permit the construction of a dam at said dam site, 60 feet in height above low water flow of said Deschutes River.' Now, your recollection is now, you didn't say anything like that?

"A. I said we would raise it, as I said before—we could probably get up from 45 to 60 feet.

"Q. That was not what he was asking you to do then?

"A. He said he would be very glad of any height we could get up.

"Q. Now, in your affidavit you say, 'Said negotiations were had, and said request was made of said Laughlin.' You don't remember that he made that request 'must go up 60 feet high'?

"A. Well, it was understood that we could go from 45 to 50 or 60 feet; something of that kind. I never saw him afterwards.

"Q. Now, did you agree at that time that you would go up that high?

"A. No, sir, we did not. We agreed to see what we could go up; we would go up whatever our maximum grade would allow us to go up.

"Q. Did you ever have any interview with Mr. Laughlin except that one time?

"A. I never saw him that I remember of.

"Q. What did he say about the height to which the road should be raised, which would be satisfactory to him?

"A. He said whatever we could get up there would be satisfactory to him.

"Q. Now, in this affidavit you say that he said, 'That

Testimony of Boschke. (Continued.)

if the height of the line of the Deschutes Railroad Company were raised to the height of 60 feet, or raised to a height to permit of a 60-foot dam at this dam site, it would be satisfactory'?

"A. Well, I think he did say that after I said we could probably get up a certain height. He may have said 60 feet, or 55 or 60 feet, whatever we could get up on the maximum grade would be very satisfactory to him.

"Q. In your affidavit you said he said that if you would go up 60 feet, to build a 60-foot dam, it would be satisfactory, didn't you?

"A. Yes, I think very likely it was a fact.

"Q. So he really did say to you, if you would go up to such an elevation as to permit the building of a 60-foot dam at this dam site, it would be satisfactory to him?

"A. Well, possibly he did, but I couldn't tell him at that day that Mr. Laughlin was making this arrangement at all.

"Q. That is what he said would be satisfactory?

"A. I expect he did.

"Q. He didn't say anything else was satisfactory?

"A. Yes, he did. He said any height would be satisfactory that we could get up to.

"Q. In your affidavit, you didn't say any height, did you?

"A. No, I didn't say that possibly, in there, but that was the fact, just the same."

(See Transcript, pp. 334-336.)

"Q. *How high a dam did you calculate could be built at the dam site without interfering with your road?*

"A. *I wasn't making any figures on the dam site at all, or the dam. I was building a railroad there, and building it as high as Icould get up, starting at eight-tenths grade at the tunnel.*

"I think a dam readily could be built there 60 feet or over without flooding our track or right of way so as to

Testimony of Boschke. (Continued.)

interfere with our railroad, if the flood waters were properly taken care of.

"Q. *Why weren't you building your road so as to guard against flood waters?*

"A. *As I said before, my object was to build a railroad there, and I was ordered to build it as high as I could, going up the maximum grade from the tunnel, and there wasn't any dam built there at that time, and there isn't to-day. In my opinion, though, a dam could be built there 60 feet, and probably would be all right, except might flood our slopes, and in that way soften them up and injure the railroad, where the slopes run down into the river.*"

(See Transcript, p. 339.)

"There was nothing said at the conference between me and Mr. Whistler in regard to the elevation of our road at the dam site. We do not reach our maximum height until we get two or three hundred feet south of the dam site.

"Q. Then how did you expect to protect your railroad at the dam site?

"A. Well, I don't—levees or something of that kind. I think there are some cuts in there; build a retaining wall or something like that. It is only a matter of a couple of feet there. It wouldn't be a hard job to keep out two feet of water. I don't recall that being discussed with Mr. Whistler. He had all the information. He had where our line was to be, and the bottom of the river was there on the ground, and he could easily tell what relation they bore to each other."

(See Transcript, pp 342-343.)

Whistler made a report to the Land Company in which he advised them of the fact that he was unable to obtain information sufficient to enable him to determine whether the line was so located that the main-

tenance of a 60-foot dam would not interfere with its operation, as the maps of the railroad did not show the line of low water and it would be necessary to examine the ground to ascertain.

Apparently Boschke told him that the road would not change its grade anyway, for in his report he said:

Whistler's report.

> "The profile handed me does not show elevation above water surface of river at proposed dam site, but Mr. Boschke states from what information he has in his office, that he believes the location is about 70 feet above water surface at dam site. Our levels in conjunction with the elevations shown on profile would indicate that their location is only about 60 feet above water surface, but it is not certain which datum the bench mark from which our levels run refers, and I doubt if absolute assurance can be gotten without sending a man to the site to determine.
>
> *"In either case, however, I am reasonably certain the railroad company would object seriously to raising their location.* An 0.8% grade was used by the company in climbing over the U. S. Reclamation Service's dam site, and this has been adopted as their maximum grade. From their profile, it appears they have used this to climb over the Sherar site, and to go higher would require them to change their location, not only throughout the entire climb, but as much farther north as necessary to obtain the increased elevation by length of line."

(See Transcript, pp. 228-229.)

White & Co.'s report.

When this report of Whistler's was received, J. G. White & Company were employed to report on the question. Whistler also went back to obtain further information from the railroad company, and was informed by them on October 29th that the road would

be seventy feet above low water (Tr., pp. 339-340). As soon as White & Company made their report, it appeared that the grade was not high enough to permit the maintenance of a 60-foot dam. Concerning this report, Martin said:

Martin's testimony.

"Q. And you never made any objection to the company on account of the method in which they were constructing their line, on account of any information that was furnished you or otherwise?

"A. I did.

"Q. At what time?

"A. I came up here as soon as I received the J. G. White report and I went to see Mr. Morrow, and I told him what was contained in this J. G. White report.

"The preliminary J. G. White report was made on March 3rd, 1910.

"Q. And that was five months after the line had been constructed across that property?

"A. Well, I can't help that; you asked me when we objected. I objected as soon as I had information on which to base an objection.

"Q. You never objected to any work of the Deschutes Railroad Company at that point by virtue of Mr. Whistler's employment, did you?

"A. He states that the water level is not known to Mr. Boschke and that he can't form a definite estimate as to where the railroad is with regard to the water.

"Q. That is generally correct.

"A. I couldn't do any better.

"Q. He also said Mr. Boschke furnished him with profile, showing the height of the line, did he not?

"A. It doesn't show the water level.

"Q. Doesn't show the water line but does show the height of the railroad grade, doesn't it?

"A. I am not an engineer, but I suppose you have to know what the height above a given point is to know what the difference is.

"Q. But Mr. Whistler could ascertain the datum from which that was taken, could he not?

"A. He asked for it, and he said in his report Mr. Boschke didn't know.

"Q. He said he didn't know the level of the water; isn't that correct?

"A. That is the very controlling feature. That is exactly the whole essence of the thing. If he doesn't know the water level, what indication would it be as to the height the railroad was going?

"The height of the railroad is not shown here because the water level is not shown.

"Q. But then this profile, all these profiles are made from definite datum, aren't they—basing point?

"A. At sea level, I assume.

"Q. And isn't it an easy enough matter to ascertain the elevation which the water is above sea level?

"A. If we ran out and took the elevation at that point. I don't suppose that was up to us, was it?

"Q. Isn't that a part of Mr. Whistler's duty? Isn't he doing it every day throughout this construction work of his?

"A. Oh, I doubt that; he wasn't constructing the Deschutes Railroad. Right here, between the two engineering companies, the Oregon Trunk on one side and your own engineers on the other, there is a difference in datum. I have forgotten whether seven or eight, or twenty-seven or twenty-eight feet.

"Q. In any event you never made any objection?

"A. We were informed by Mr. Whistler that Mr. Boschke had given him a profile; he examined that; it didn't have water level on it, and he couldn't tell if the railroad at that point was 60 or 70 feet above mean low water, or what the elevation was.

"I don't recollect whether Mr. Whistler stated he had been on the ground or not. He may have. I don't think he was. I think he examined what Mr. Boschke gave him here.

"Q. But in any event you never made any objection to

Martin's testimony. (Continued.)

the construction of this line until after you received the report of J. G. White & Company in March, 1910?

"A. I didn't make any objection to the railroad construction until I had a basis for knowing what I was talking about.

"I don't think the railroad company ever refused to give us any information they had about the construction of the line, or to our employees."

(See Transcript, pp. 197-199.)

We respectfully submit, in view of these facts, that under settled principles of law, no estoppel arose.

Summary.

The evidence shows quite clearly that when the Railroad Company commenced to construct its line it determined to adopt a grade of 0.8 per cent. and no more. This grade commenced at the tunnel. The profile map of the Railroad Company did not show whether this grade would permit the maintenance of a 60-foot dam, for the map did not give the water level. Accordingly, when Whistler called on Boschke and procured the map he was still unable to ascertain what the result would be. He asked Boschke what the elevation would be and was informed by Boschke that the elevation would be 70 feet. Whistler was doubtful of the accuracy of the statement but could not ascertain the fact without sending a man to the ground (Tr., p. 333). He also gathered the impression that the Railroad would not change its alignment under any circumstances. All this he sets forth in his letter of October 6, 1909, to Balfour, Guthrie & Company. On October 29th he again called on

Boschke and was shown another map, which gave no water level, but was assured that the line of the road was high enough to permit the construction of a 60-foot dam. He called attention to the necessity of a high grade at the point where the moving body of the stream entered the water of the reservoir, and emphasized the necessity of providing for a 60-foot dam (Tr., p. 333). Whistler testified that he never approved the line adopted (Tr., p. 570), and Boschke does not assert he did. In the first opinion of the lower court it is held that the failure of the plaintiff to send a man to the ground to check the figures of the Chief Engineer of the Railroad and ascertain whether the grade adopted was sufficient to comply with the contract affords the basis for an estoppel.

Summary. (Continued.)

The conclusion of the District Court.

This is clearly erroneous. Obviously, the conduct of the Land Company evidences no intent to waive or abandon the right to a 60-foot dam; indeed, Boschke asserts no such impression. The duty of adopting a sufficient grade was cast upon the Railroad Company by the contract under which it was permitted to go on the land.

Error in the view adopted by the District Court.

In *Unangst's Appeal,* 55 Pa. St., 128, the Supreme Court of Pennsylvania had before it a case strikingly similar to the case at bar. The facts are stated in the opinion, which is as follows:

Authorities on the question of estoppel.

> "This is a bill in equity to restrain the defendants from proceeding to construct a railroad upon the farm of the plaintiff. The plaintiff alleges they have entered and are unlawfully constructing their railroad without his consent

Unangst's Appeal.

Unangst's Appeal. (Continued.)

and without payment of a compensation or giving him security therefor; and that their acts, if persisted in, will do him great and essential injury. The answer of the defendant justifies under an alleged agreement to permit them to enter and construct their railroad, provided they would do so on the west side of the brick house near Bethlehem, against the hillside, and high enough to save his water-power, which the answer alleges he estimated at eight feet above low-water mark; and avers that they accepted this condition, and have proceeded to perform the same, and are constructing the road high enough to save complainant's water-power, to wit, eight feet high above low-water mark. Thus the height of the grade, to avoid injury to the water-power, is an admitted condition of the right to enter and construct, but the height is alleged to have been estimated at a given number of feet.

"The defendants called two witnesses to prove the alleged license, both of whom were stockholders who had assigned their stock for the purpose of being witnesses, one to his wife, and the other to his son, a portion of his subscription being yet unpaid. They were objected to, and were of doubtful competency; but it is unnecessray to decide this question. According to the testimony of one, the plaintiff said to Mr. Brodhead, the president of the company, in a conversation about changing the route of the survey, 'If you go down there on the other side of the brick house—west side—and do my house no harm, and on this side do my water-power no damage, then go on. I have quarried stone for a mill and still-house, and if you stay up there on the west side between me and Kemmerer, just go on and make the railway. I will ask nothing.' The other witness says, 'Mr. Unangst then told Mr. Brodhead that if they would change it (the route) to bring the road high enough not to interfere with his water-power, they should just go on with the road; that if they stayed up high enough he would not charge much or anything.' Neither of these witnesses—and they are the only witnesses of the alleged consent—testifies to any

estimate being made by the plaintiff of the height of the grade necessary to save his water-power.

"The defendants gave no proof whatever that the road was being built high enough to avoid injury to the water-power. The proof of both of these facts, the estimate of height alleged, and that the height in fact did no injury, lay on the defendants: *Purdy* v. *Wright,* 7 Casey, 387. Thus both answer and proof concede that the express condition of the right to enter and construct before compensation or security rests on making the grade high enough to avoid injury to the water-power, while no proof of a sufficient height was given by the defendants. But the plaintiff proved expressly by two witnesses, one of whom was an engineer who had levelled the height of the water and of the grade of the road, that the water in the stream could not be dammed up to the water-level of the old dam at the forebay without submerging the railroad from five to six feet.

"The master decided the case, on the fact that the railroad was located and being constructed on the west side of the brick house, substantially on the route indicated by the plaintiff in his conversation with Brodhead.

"But he does not find the fact, or notice in his argument, that the grade was high enough not to injure or interfere with the plaintiff's water-power. He argues that defendants having a legal right of entry, and the plaintiff having consented to their entry and construction of the road at the place designated by him, he waived his right to compensation or security before entry; and, if entitled to damages at all, he must seek compensation in the mode pointed out by the charter. His argument, however, overlooks the fact that the legal right of entry is subject, by the amended constitution, to the condition of compensation or security before it can be exercised; and that the alleged waiver was made upon a fundamental condition involving this very right of compensation, by preventing the injury which would call most loudly for it.

Unangst's Appeal. (Continued.)

The condition of waiver was of prime importance to the plaintiff.

"He saw a line of the road surveyed which would ruin his water-power, and he said to the president, 'Change your route and go over there and raise up your road high enough to do my water-power no injury, and I will ask no damages or not much.'

"The object of his consent was to save his water-power —going over to the hillside was but a means to that end. To ruin his water-power was to do him irreparable and serious injury.

"To save it was to render the injury almost inappreciable. It needs no argument to show that to violate this feature of the agreement, was to ignore the fundamental condition that procured his assent to the entry and construction of the road without compensation or security first made.

"Yet the master either overlooked, or attached so little importance to this fact, that he did not even mention it. But he concedes the principle in his argument. He says it is urged that the landowner is not remediless because of his consent to an entry on his land for railroad construction. Certainly not (he replies), if there be a plain and palpable violation of the privileges granted; as a right to cross one end of a farm does not justify entry and construction across the middle. But (he proceeds to say) when the road is laid out and constructed nearly or quite upon the designated route, the complainant cannot claim an injunction against the necessary consequences of such construction. But this is the very mistake. Destruction of the water-power is not the consequence of construction upon the designated route, but of construction in violation of the designated grade, to wit, an elevation sufficient to save the water-power. A deviation from the route he concedes to be a violation of the condition of consent; but deviation from grade, which is the all-important matter, he seems not to have thought of.

"The route was prescribed for the very purpose of

raising the grade and of reaching the level necessary to preserve the power. It was the single thought of the plaintiff, and he stated that he hauled the stones and was going to build a new mill and a distillery. In his short conversation he was distinct in his utterance, that if the route was changed to 'bring the road high enough not to interfere with his water-power, they should just go on with the road.' It then became the duty of the company to examine the designated route to ascertain whether it would suit their purpose, and carry the road up to the required elevation without too much expense. If it did not suit their alignment, or if it would require too great a fill to reach the proper elevation, they need not go on under this license, and had it in their power to enter and construct the line to suit themselves, by giving the security or making the compensation necessary to entitle them to proceed.

"It is insisted by the plaintiff that the license was not binding, it being neither expressly accepted nor reduced to writing. It is unnecessary to decide these questions, but they lead to some comments upon the facts. According to the defendants' two witnesses, not a word was said by Brodhead in reply to the plaintiff. He neither said he would accept the terms nor promised to fulfill the condition. The master rests this part of the case wholly upon the subsequent change in the line, and the proceeding to construct on the indicated route. But the conduct of Brodhead required notice. Though he had said nothing in answer to the plaintiff, he followed Herman, the witness who had gone forward, called him to stop and said: 'Have you noticed the words this man spoke?' Herman said yes, and Brodhead said no more. This evidently looks more like a catching bargain than a fair and open effort to obtain the plaintiff's consent. The absence of a writing under these circumstances, and of any assurance on the part of Brodhead to observe the condition, does not look well. When a railroad company asks to divest a citizen of rights sacredly guarded by the con-

Unangst's Appeal. (Continued.)

stitution, it is the least it can do to come into court, if not with a writing, with full, distinct and unequivocal proof of the waiver it alleges. The only question remaining is, whether equity will interfere to prevent the injury. Of this I cannot doubt. After the construction of the road the plaintiff cannot build up his dam, for this would submerge the road five or six feet, and make it impassable. He would then have to put up with uncertain damages, and the risk of collection, as well as its difficulties and delays. He is not bound to yield his undoubted right to previous compensation or good security, and it would be most inequitable to force him into this position.

"A corporation obtaining a concession to enter on condition of refraining from a particular injury, in its nature irreparable, and which cannot be readily estimated in damages, forfeits its license when it violates this condition, and should be restrained until it does equity. It comes under that head of equity power which extends to the prevention or *restraint* of the commission or continuance of acts contrary to law, and prejudicial to the interests of the community, or the rights of individuals. The act in this instance, if continued to be done, is in its effect upon the rights of the plaintiff of the same nature as waste. Even a tenant without impeachment of waste will be restrained from doing unnecessary and injurious waste: 3 *Daniels Chan. Pr.* (1865), pp. 1737-38. . . ."

Unangst's Appeal, 55 Pa. St., 128, pp. 135-138.

The decision in this case is directly applicable to the case at bar. In view of the evidence, the estoppel asserted must rest upon the failure of the Land Company to act under the conditions outlined, not upon any misrepresentation. But as

a matter of law and of fact the Land Company was not called upon to act. *It did not know that the grade adopted was insufficient and could not ascertain that fact without employing engineers to do the very work the Railroad Company had assumed the obligation of doing. There were no facts known to the Land Company and not known to the Railroad Company. The means of knowledge of the Railroad Company were just as great as those of the Land Company.* Under these circumstances the first essential element of an estoppel is lacking.

Crary v. Dye.

In *Crary* v. *Dye,* 208 U. S., 515, at 521, the court said:

> "The principle of estoppel is well settled. It precludes a person from denying what he has said or the implication from his silence or conduct upon which another has acted. There must, however, be some intended deception in the conduct or declarations, or such gross negligence as to amount to constructive fraud. *Brant* v. *Virginia Coal & Iron Co.,* 93 U. S., 326; *Hobbs* v. *McLean,* 117 U. S., 567. And in respect to the title of real property the party claiming to have been influenced by the conduct or declarations must have not only been destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel. *Brant* v. *Virginia Coal & Iron Co., supra.* These principles are expressed and illustrated by cases in the various text books upon equitable rights and remedies. Does the conduct relied upon in the case at bar satisfy these principles?"

Tustin v. Reading Company.

In *Tustin* v. *Philadelphia & Reading Coal & Iron Co.* (95 Atl., 595, 9), the Supreme Court of Pennsylvania said:

> "The facts of the case do not disclose the elements of an estoppel. An estoppel can be claimed only by one who has acted in ignorance of the true state of facts (*Hill* v. *Epley*, 31 Pa., 331; *Woods* v. *Wilson*, 37 Pa., 379), *and who was without suitable means of informing himself of their existence* (*Cuttle* v. *Brockway*, 32 Pa., 45). If he had notice of the facts, and was not misled to his disadvantage, there can be no estoppel. (*Duquesne Bank's Appeal*, 74 Pa., 426; *Wright's Appeal*, 99 Pa., 425). Silence becomes a fraud, and works an estoppel, only when a party withholds information which the other party does not have, or does not possess the means of obtaining, and which he should have to protect his rights. *Where both parties know the facts, or have equal means of knowledge of the facts, the silence of either in regard to them is not a fraud upon the other party. Rhawn* v. *Edge Hill Furnace Co.*, 201 Pa., 637; 51 Atl., 360.
>
> "There is no evidence in the case that the defendant was prejudiced or misled to its injury by the conduct of, or alleged interpretation of the lease by Mr. Wolverton or the beneficially interested parties. The lessee acted with a full knowledge of all the facts."

Hawley v. Florsheim.

In *Hawley* v. *Florsheim* (44 Ill. App., 321, 5), the court said:

> "A party contracting to construct a party-wall, or to do work of any kind, assumes to be possessed of the skill necessary to enable him to perform his contract, and he must be presumed to know and understand the terms of his agreement; if he fails to fulfill his undertaking, if in violation of his promise he does his work in a negligent and improper manner, it is not a sufficient excuse, and will not relieve him

from responsibility, that the owner, knowing of the improper work when it was going on, failed to remonstrate and object. *Davidson* v. *Young*, 38 Ill., 145, 152; *Bigelow on Estoppel*, 662, 670; *Dinet* v. *Eilert*, 13 Ill. App., 99.

Hawley v. Florsheim. (Continued.)

"The doctrine of estoppel *in pais* is based upon a party being misled by conduct upon which he had a right to rely; but a party having contracted to do good work, has no right to rely upon the owner's failure to object to poor."

In *C. H. Rugg Co.* v. *Ormrod* (198 N. Y., 119; 91 N. E., 368), the Court of Appeals said:

Rugg v. Ormrod.

". . . An estoppel resting wholly upon equity cannot be used to shift a loss from one careless person to another when the loss could not have happened without the earlier negligence of the plaintiff, and the later negligence of the defendant, at the most, only contributed to the result."

But even if the conduct of the plaintiff has been such as to afford a basis for an estoppel had the defendant acted in reliance thereon, the evidence shows that the action of the defendant was in no way influenced by the acts or omissions of the plaintiff.

The Railroad Company was not misled by the conduct of the plaintiff.

The Railroad Company took no measurements to ascertain the location of the water level till April 3, 1910, after this action was commenced (Tr., p. 381). But on October 29th Boschke states that he informed Whistler that the line would be high enough to permit the maintenance of a 60-foot dam. He says:

Testimony of Boschke.

"Q. In your affidavit you say this: 'On October 29, 1909, I delivered to Mr. John T. Whistler maps and profile of the line of the said Deschutes Railroad Company as amended, to comply with the undertaking and agreement had with said B. F. Laughlin, and showing the elevation at

Testimony of Boschke. (Continued.)

which said line was then being constructed, and work on it had been prosecuted for approximately two months, and discussed with said John T. Whistler the height at which said grade was being constructed, and informed the said Whistler that the same was of a height sufficient to permit the construction of a dam at the site known as the Interior Development dam site above referred to, of 60 feet in height.

"A. Well, I think that is right too."

(See Transcript, p. 340.)

Here are representations forming a basis for estoppel against the Railroad Company, not in its favor.

But apart from this Boschke says:

"Q. *How high a dam did you calculate could be built at the dam site without interfering with your road?*

"A. *I wasn't making any figures on the dam site at all, or the dam. I was building a railroad there, and building it as high as I could get up, starting at eight-tenths grade at the tunnel.*

"*I think a dam readily could be built there 60 feet or over without flooding our track or right of way so as to interfere with our railroad, if the flood waters were properly taken care of.*

"Q. *Why weren't you building your road so as to guard against flood waters?*

"A. *As I said before, my object was to build a railroad there, and I was ordered to build it as high as I could, going up the maximum grade from the tunnel, and there wasn't any dam built there at that time, and there isn't today. In my opinion, though, a dam could be built there 60 feet, and probably would be all right, except might flood our slopes, and in that way soften them up and injure the railroad, where the slopes run down into the river.*"

(See Transcript, p. 339.)

Testimony of Boschke. (Continued.)

From this testimony it is perfectly obvious that the Railroad Company did not act in any particular on any assumption drawn from the conduct of the Land Company. It did what railroads usually do after taking possession, it built just as it desired and intended to build, disregarding to such extent as it desired all contract obligations.

In *Wiser* v. *Lawler* (189 U. S., 260, 70), the Supreme Court said:

> "Putting the case in the most favorable light for the plaintiffs, it was only a case of estoppel by silence. Indeed, it was not even an ordinary case of estoppel by silence, but an estoppel by silence concerning facts of which defendants may have had no actual knowledge. To constitute an estoppel by silence there must be something more than an opportunity to speak. There must be an obligation. This principle applies with peculiar force where the persons to whom notice should be given are unknown. So, too, to constitute an estoppel, either by express representation or by silence, there must not only be a duty to speak, but the purchase must have been made in reliance upon the conduct of the party sought to be estopped. . . ."

Wiser v. Lawler.

In *Willmott* v. *Barber* (15 L. R. Ch. Div., 105), Fry, J., said:

> ". . . It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must

ser v. Lawler
ntinued.)

have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do."

It is elementary that no estoppel exists unless the person asserting the estoppel has changed his position in reliance on the act on which the estoppel is based. See

Ewart on Estoppel, p. 131;
Bigelow on Estoppel, p. 638.

The following decisions of the Supreme Court of the State of Oregon show quite clearly that under the law of that State it was not incumbent on the plaintiff to supervise the defendant in the performance of the work authorized, and that the failure of the plaintiff to ascertain and point out the particulars in which the work did not conform to the authority given,

created no estoppel. Indeed, the cases hold that no estoppel will arise even where the land owner has actual knowledge of the fact that the work done is not authorized, and fails to protest.

Falls City Lumber Co. v. *Watkins,* 53 Ore., 215; 99 Pac., 884;
Lavery v. *Arnold, Estoppel,* 36 Ore., 84; 57 Pac., 906;
Miser v. *O'Shea,* 37 Ore., 231; 62 Pac., 491;
Ewing v. *Rhea,* 37 Ore., 583; 62 Pac., 790;
Brown v. *Mining Co.,* 48 Ore., 277; 86 Pac., 361;
Hallock v. *Suitor,* 37 Ore., 9; 60 Pac., 384.

See also:

Speer v. *Erie R. R. Co.,* 64 N. J. Eq., 601, 610; 54 Atl., 539;
St. Louis Nat. Stock Yards v. *Wiggins Ferry Co.,* 112 Ill., 384; 54 Am. Rep., 243.

Summary.

The fact of the matter is that there is no basis whatever for the claim of estoppel. The railroad company did not do any act in reliance on any representation of the land company, nor did the land company negligently induce the railroad company to alter its position. The line on which the road was built was surveyed in March, 1909, and the survey was complete so that the railroad ordered work to commence the day that the arrangement with the Sherar executors was concluded (Tr., p. 483). The railroad did not

Summary. (Continued.)

know how high this line ran above low water level, not taking the trouble to ascertain this matter till after this suit was commenced (Tr., p. 381). But the railroad promised to build so that a 60-foot dam could be constructed. Boschke believed that the line adopted would be sufficiently high, but did not take the trouble to verify this belief. The only false representation made was that of the railroad. When requested to exhibit the profile of the line, Boschke showed a map, but the map did not show the water level. When this was commented on by Whistler, Boschke declared that the grade was sufficient to permit the maintenance of a 60-foot dam. He made this declaration without taking the trouble to ascertain either the water level or the past history of the stream in periods of high water. This was the only false representation made. Whistler doubted its truth, and the land company proceeded to investigate. It did not obtain the information till after the grade was partially constructed. This delay is now made the basis for a claim of estoppel, though the railroad was not completed or in operation at the time this suit was brought, indeed, the rails were not then laid. The railroad nevertheless resisted an injunction, alleging compliance with its agreement. The idea of estoppel was an afterthought, not pleaded or proved.

Inconsistent Position of Railroad Company.

Before closing on this branch of the case which deals with the rights of the defendant over the Sherar property, it is but proper to recall that the agreement between Sherar and the railroad was made by Sherar's heirs as the owners and claimants of the

entire tract of land of which they were then in possession; that is, both the property to which the patents had issued and property not patented till 1913. The railroad company dealt with the Sherar heirs as the owners and persons in lawful possession of the entire tract. Having entered on the entire property under the license, it attempts to set up title to part of the tract and claim as licensee on the rest. Obviously, this cannot be done in a court of equity. So, even if the railroad had established the priority of its right-of-way over the land patented in 1913 (which it has not done), it has nevertheless waived that right and entered the entire tract as licensee. It must abide by the terms of its license, and cannot repudiate the obligation as to part of the property and violate its obligation as to the rest.

Inconsistent Position of Railroad Company. (Continued.)

INTERIOR DEVELOPMENT PROPERTIES.

In the preceding pages of this brief we have dealt only with the questions concerning the Sherar lands. So far as the lands acquired from the Interior Development Company are concerned, the record is substantially as in the case considered. It does appear, however, that Welsh, one of the parties interested in the Development Company, was shown the profile map of the road as constructed, and expressed satisfaction with it.

Here, as in the case of the Sherar lands, the agreement provided for a 60-foot dam. *It does not appear that the road as constructed complies with the agree-*

ment between the Development Company and the Railroad, or that the Land Company purchased the properties of the Development Company with either knowledge or notice of the fact that any departure from the 60-foot agreement had been authorized.

No Right Existing in Favor of the Railroad over the Interior Development Company Lands Excuses the Performance of the Obligations Assumed in Relation to the Sherar Lands.

The lands of the Development Company are small in extent, consisting of two 40-acre tracts, and the existence of a right-of-way over part of these properties on the line on which the road is actually constructed is not fatal to the right to maintain a 60-foot dam at the Sherar Bridge. But apart from any technical question of this class, it is quite apparent that *the Railroad cannot claim against the Land Company under a contract by virtue of which it acquired its rgiht-of-way on condition that the road would be constructed so as to permit the erection of a dam 60 feet high, and at the same time dispute the right of the Land Company to erect such a dam, on the theory that this cannot be done without flooding the right-of-way where the same has been acquired over other property.*

Having entered into possession and claimed under a contract which obligated it to build its road at a point which will permit the maintenance of a 60-foot dam, equity will not permit the Railroad to assert any right which would nullify the obligation which it has assumed, and as a consideration for which it obtained the right of entry.

The Railroad Company must abide by its contract as a whole or pay damages in equitable condemnation as though no contract existed.

PART III.

DAMAGES.

The amount of damage sustained by the plaintiff has been variously estimated. Dillman says:

Damage to the Tract as a Whole.

"The main thing, however, is the liability of the power company in case they have to build with regard to the Deschutes Railroad. If the railroad company has a right to be in its present position, and the power company has to respect that right, as at present occupied, the power company could not develop its power for a great many years, if ever. If, on the other hand, the power company has a right to develope, and the responsibility of friction with a railroad company is entirely to be borne by the railroad company, the damage to the power development amounts to five per cent. of the power, plus the extra cost of construction by reason of the railroad being there. The first possibility, entire responsibility in the matter, means that the power possibility is worth very little at present and it is hard to estimate when it would be worth developing."

(See Transcript, p. 276.)

Kyle, Chief Engineer of the Oregon Trunk Railroad, said:

"Questions by the Court:

"How much less value has that tract of land with the railroad through it than it had without—the Sherar tract of land?

"A. Do you mean without one railroad or without both of them?

Damage to the Tract as a Whole. (Continued.)

"Q. Without the Deschutes Railroad.

"A. Well, if you take it as a power site proposition, I should say there was quite a good deal of difference.

"Q. Suppose the railroad was located right where it is now, taking the availability as you see it for a power site, how much less valuable is that power site with the railroad located where it is than it would be if it were located 4½ feet higher?

"A. Oh, I should say probably $75,000."

(See Transcript, p. 299.)

Damages of a Special Nature.

"The existence of the railroad where it is would make some difference in the cost of handling rock and material in the construction of the dam. I figure there would be about 30,000 yards of rock in the dam, and it would cost 20 cents more to handle it with the railroad there than without it, about $7500.

"Q. What is the fact as to the lands in controversy here owing to the situation in the Deschutes canyon, possessing a value for railroad right of way purposes at the time they were taken by the defendant?

"A. I know some of them seem to think they are very valuable—some of the people thought so. *We paid quite substantial prices for right of way across these properties on the Oregon Trunk side.*"

(See Transcript, pp. 298-299.)

The fact that the lands in question form the best power site in Oregon is stated by the defendant's own witnesses, and seems to be admitted (Tr., p. 467).

Apart from the heavy damage arising from the impaired value of the property as a whole, a good many small items of damage arise from the increased cost of construction and the necessity of clearing the

Damages of a Special Nature. (Continued.)

debris which the railroad took from the cuts and threw upon the dam site. The question of damage cannot be resolved upon this record.

If, as we respectfully contend, the Land Company has a right to erect and maintain a dam 60 feet high and the railroad is obliged to accept the risk of flood and bear the burden of such damage as results therefrom, the amount of damage is relatively small. If, on the other hand, the road is to be permitted to repudiate its contract and retain its present location, paying damages by way of equitable condemnation, a large sum must be allowed. Under either contingency, the matter must be remitted to the lower court.

THE LAND COMPANY SHOULD NOT BE DEPRIVED OF ITS RIGHT TO ERECT AND MAINTAIN A 60-FOOT DAM BY A DECREE FOR EQUITABLE CONDEMNATION.

Equitable Condemnation Should Not Be Decreed.

We respectfully submit that sound principles of equity require that a decree be entered declaring that plaintiff has the right to maintain a 60-foot dam at the Sherar Bridge and that the railroad right-of-way is subordinate to the easement to maintain such a dam.

The entry of the Railroad Company upon the lands was made pursuant to an agreement by which its right to build was expressly subordinate to the right of the owners to erect a 60-foot dam. There can be and is no pretense that the road cannot be constructed and its alignment changed so that this may be done. Nor is

Equitable Condemnation Should Not Be Decreed. (Continued.)

the estimated cost of such a change any heavier burden than is the amount of damage otherwise arising (Tr., pp. 276, *et seq.*). Indeed, the railroad always knew that money would have to be expended on the line when the dam was built, and Boschke so testified. On this subject he said:

Testimony of Boschke.

"Q. If the dam were constructed at the dam site only 60 feet in height, you have so built your railroad it would not affect your railroad at that place?

"A. No. I think it could be built there and protected, inasmuch as we would have to do more rip-rapping at those places, I mean.

"Q. In your affidavit you say a dam can be built there 50 (60 ?) feet in height, without affecting your railroad?

"A. Of course it can. That is only a nominal expense, a few thousand dollars to riprap those banks and make them safe, but we certainly wouldn't be spending that money now until there is a dam there to spend it for.

"Q. Then I understand, Mr. Boschke, that in your judgment, a dam can be built at the dam site 60 feet in height, and it wouldn't affect your railroad as now constructed at all?

"A. I think so.

"We had only one survey at the time of the conference with Mr. Laughlin—only one located line. We may have had some preliminaries. There was nothing said at the conference between me and Mr. Whistler in regard to the elevation of our road at the dam site. We do not reach our maximum height until we get two or three hundred feet south of the dam site.

"Q. Then how did you expect to protect your railroad at the dam site?

"A. Well, I don't—levees or something of that kind. I think there are some cuts in there; build a retaining wall or something like that. It is only a matter of a

Testimony of Boschke. (Continued.)

couple of feet there. It wouldn't be a hard job to keep out two feet of water. I don't recall that being discussed with Mr. Whistler. He had all the information. He had where our line was to be, and the bottom of the river was there on the ground, and he could easily tell what relation they bore to each other."

(See Transcript, pp. 342-343.)

The fact that as constructed the road is some five feet above the crest of the dam insures the continued operation of the road except in time of high flood, a matter of rare occurrence. The Oregon Trunk line is constructed at a proper grade and affords ample facilities for the service of the public during the occasional periods for which the operation of the Deschutes line may be interrupted. Public convenience does not require that the right of the Land Company to develop in a proper and economical manner the project which it has undertaken be subordinate to the right of the railroad to maintain its line as now located. In fact, the balance of public convenience inclines in favor of requiring the railroad to subordinate its rights to the rights of the Land Company, or move its track to a point higher up the canon. The economical development of power is as important, if not more important, to the public than is the maintenance of this road on the particular line adopted. There is, therefore, no reason why the obligations voluntarily assumed by the road should not be enforced. Equitable condemnation should not be de-

Testimony of Boschke. (Continued.)

creed in order to allow a public service company to disregard its contractual obligations unless public convenience so requires.

Unangst's Appeal, 55 Pa. St., 128.

THE DAMAGES AWARDED ARE WHOLLY INADEQUATE.

The decision of the lower court awarded no damages to plaintiff for the right-of-way over the land patented in 1913, though the existence of the right-of-way was decreed. This is, of course, erroneous, even if equitable condemnation is to be decreed. No severance damage was awarded plaintiff, though the utility of the tract as a whole was seriously impaired. The only award to plaintiff was of the sum of $1000 for land actually taken. Concerning this the court said:

> "The evidence shows that the defendant railway is located along the sides of a steep canyon over land of but little if any substantial value. There is no evidence in the record as to the quantity of land occupied by the road nor its value, but since the defendant admits and alleges that it agreed to pay the Sherar heirs a thousand dollars for the right of way in case the holder of the option did not purchase, I assume in the absence of other evidence that such an amount is a reasonable compensation to be paid for the land taken."

(See Transcript, p. 124.)

The negotiations between the railroad and Sherar may be in the nature of admissions against interest on the part of the defendant but are no evidence of value

Considerations inducing Sherar executors to accept a small price.

of the land so far as this plaintiff is concerned. Indeed, in agreeing on this sum the Sherar executors were affected by collateral considerations not in any way present in the case of this plaintiff. Concerning this, Huntington says:

> "The Sherar heirs were anxious for the construction of a railroad at that point. They owned a large body of land on both sides of the river and they thought the building of the road would enhance the value of their other lands."

(See Transcript, p. 179.)

> "The lands of the Sherar estate I referred to when I said that the estate owned other lands, the value of which was supposed to be enhanced by the building of the railroad, are the lands known as the Finnegan ranch, consisting of between two and three thousand acres, the nearest point of which to the railroad would be perhaps four miles; upon the hill in Sherman County. They also owned some land in Tygh Valley on the other side of the river. I think a section and a half or perhaps two sections. It was not considered that the building of the railroad would enhance the value of the Sherer lands in the canyon, which were under the Hostetler option."

(See Transcript, pp. 182-183.)

Burden of proof.

There is no evidence in the record justifying this award, and as the burden of proof was on the defendant, the decision cannot be sustained in any particular.

In cases of equitable condemnation, no issue concerning value is presented by the pleadings and the award of damages in lieu of injunction is made on the answer of the defendant and at its instance. As no pleadings raising the issue of the amount of damage

Burden of proof. (Continued.)

exist, the burden of proof necessarily rests upon the defendant after the right of the plaintiff has been made out pursuant to the ordinary rules of equity.

See

Seattle & M. Ry. v. *Murphine,* 30 Pac., 720;
Neff v. *Cincinnati,* 32 Ohio St., 215;
Park Com. v. *Trustee,* 107 Ill., 489;
Bellingham Bay Co. v. *Strand,* 30 Pac., 144.

We respectfully submit that the judgment must be reversed and that the cause should be remanded to the lower court with direction to decree that the rights of the railroad company are subordinate to the plaintiff's right to erect and maintain a 60-foot dam, and with further direction to that court to ascertain and determine the actual damage occasioned to plaintiff by reason of the manner in which the work was done and the value of the property taken subject to the easement. If this decree be made, no claim can be allowed for damage to the water power, but if the right-of-way be awarded to the defendant, free from the easement, then damages to the value of the property as a whole should be ascertained and awarded.

Respectfully submitted.

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